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American Bar Association JOURNAL

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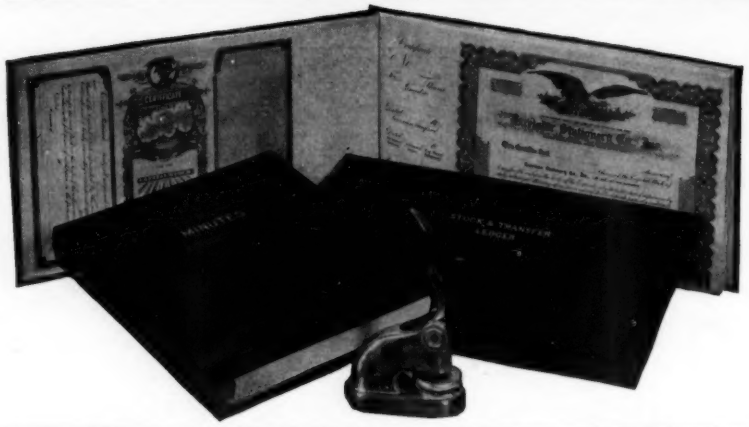

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Table of Contents

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The President's Page

Ross L. Malone

Committees and Committee Appointments . . . Special Committee on Federal Legislation . . . Action of the House of Delegates with Reference to Canon 35 . . . Committee on Court Congestion.

Committees and Committee Appointments

At the outset of his term of office, the President of the American Bar Association inevitably is very conscious of the subject of committees and committee appointments. Necessarily, a national organization must function almost entirely through its committees, and the American Bar Association is no exception. By the same token, its accomplishments will be directly attributable to them.

In correspondence and conversations concerning committee appointments, it has become apparent that many members of the Association, including some members of the House of Delegates, are not familiar with the several categories of committees of the Association and their relation to the Association. Perhaps it would be helpful to discuss them, particularly as they relate to an incoming President and his appointments.

The Association now has twenty-eight Standing Committees, including the Standing Committee on Traffic Court Program, which was converted from a Special Committee at the Los Angeles Meeting. Under the Constitution and By-Laws of the Association, Standing Committees normally are composed of seven members appointed for staggered terms of three years each. An incoming President is charged with the appointment of successors of the members of Standing Committees whose terms are expiring and in addition with the designation of the member of the committee who will serve as chairman during his term of office.

Special Committees compose the second category of the Association Committees. There are now thirty-six Special Committees of the Association, each of which was originally created by action either of the House of Delegates or the Board of Governors. A Special Committee continues only until the adjournment of the Annual Meeting following its creation, unless it is continued in existence for the ensuing year by affirmative vote of the House of Delegates. Special Committees are composed of five members unless otherwise provided in the resolution creating the committee. Inasmuch as the life of a Special Committee, in effect, is extended a year at a time by action of the House of Delegates, all members of the committee are appointed by each incoming President, to serve for a term of one year only. The President, of course, designates the Chairmen of Special Committees also.

In certain instances, the House of Delegates has authorized the appointment of Associate and Advisory Committees composed of one member from each state, who assist in the conduct of the program of the committees to which they are appurtenant. Upon recommendation of the "parent" committees, Associate and Advisory Committees have been created to assist the following Standing and Special Committees of the Association: Standing Committee on Professional Ethics; Standing Committee on Legal Aid Work; Standing Committee on Judicial Selection, Tenure and Compensation; Standing Committee on American Citizenship; Standing Committee on Membership; Standing Committee on Unauthorized Practice of the Law; Standing Committee on Aeronautical Law; Standing Committee on Public Relations; Special Committee on Federal Legislation; and Special Committee on Co-operation with Legal Profession of Friendly Nations.

In the case of the Standing Committee on Public Relations, the Associate and Advisory Committee is appointed on a national rather than a state-by-state basis.

The Special Committee on Traffic Court Program which became a Standing Committee of the Association by action of the House of Delegates and Assembly at the Los Angeles Meeting, was authorized to create an Associate and Advisory Committee, which will be done during the coming year.

The theory of an Associate and Advisory Committee is that through it the Committee has a representative in each state of the Union available to further its program in that state. His function is to effect liaison between the American Bar Association Committee and state and local association committees active in the same field and likewise to make recommendations to the parent committee of action which is deemed desirable.

Under the Constitution of the Association, all appointments to Committees are made by the President. The incoming President inevitably experiences a great feeling of frustration in considering committee appointments. There are almost 100,000 members of this great Association. Thousands of them have rendered distinguished service to their state and local associations. They merit recognition by the American Bar Association and offer experience to it

which would be invaluable in the activities of the Association.

These men and women are not only interested but anxious to serve upon committees of this Association. An incoming President quite properly receives literally hundreds of recommendations from interested members of the House of Delegates and of the Association, of outstanding lawyers who are qualified for service on various committees of the Association, and anxious to undertake such service. The approximately nine hundred committee appointments that are available to the incoming President are wholly inadequate to take advantage of this potential source of Association strength. Under these circumstances, the individuals who accept appointment to Standing, Special and Associate and Advisory Committees of the Association have a very real obligation to devote their interest and their time to the affairs of the Association in the area served by their committee.

The staggered terms of office of members of Standing Committees provide continuity in the activities of these committees. In the case of Special Committees, it must be provided by reappointment of a number of experienced members of the committee each year. If the provision of the By-Laws applicable to Standing Committees is accepted as a criterion, the infusion of "new blood" into Special Committees at the rate of one third of the members in a given year would seem justified. In general, I have followed that policy. In some instances, however, where a committee is "at midstream" in the development of an important project, the interest of the Association is best served by reappointment of the entire committee. In other instances, it has seemed that a transition period justified appointment of a larger percentage of new members.

The same rotation which is desirable in the membership of committees is desirable in the chairmanship of a committee, and has resulted in new committee chairmen of several Standing and Special Committees for the coming year.

It should be quite obvious that rotation of committee members, and of the chairmanship of committees in an organization the size of ours, is to be desired. Such rotation results in the recognition of new talent and the infusion of new energy, and in no sense is a reflection upon the committee member or chairman who is not reappointed.

The misapprehension that appointments to committees of the eighteen Sections of the Association are made by the President of the Association is so widely held that I feel it worthwhile to mention the fact that the Sections are completely autonomous in this respect. All appointments to their several committees are made by the respective Section Chairmen.

Special Committee on Federal Legislation

The Special Committee on Federal Legislation, under the able direction of former United States Senator Robert W. Upton, of New Hampshire, has been especially active during the past twelve months, and undoubtedly will be even more active during the coming year. This Committee has the primary responsibility of acting for the Association in seeking to bring about the enactment of federal legislation which has been proposed by Sections and Committees of the Association and has been approved by the House of Delegates. This Committee rendered extremely effective service in supporting the bill to authorize incentive pay for lawyers in the Armed Forces. It likewise was active in supporting the enactment of the Jenkins-Keogh Bill, the Omnibus Judgeship Bill, and other proposed legislation in which the Association is interested.

While none of these bills were enacted by the Eighty-Fifth Congress, it is expected that similar legislation will be introduced in the Eighty-Sixth Congress, and the Committee on Federal Legislation again will be active in supporting the enactment of these and other House of Delegates approved bills in the area of interest of our Association.

The assistance of members of its Associate and Advisory Committee is particularly vital to this Committee, because it is through stimulating the interest and activity of lawyers throughout the United States who will communicate their views to their representatives in the Congress that the legislative program of the Association will be enacted.

Various means have been developed to increase the effectiveness of the functioning of the Committee on Federal Legislation in some of the states. In at least one state, the member of the Associate and Advisory Committee on Federal Legislation created an *ad hoc* committee with members throughout the state to assist him in carrying out the program of the committee. This might be effective in other states, particularly those having a large number of Congressional Districts. While such a committee is not authorized by the By-Laws of the Association, I see no objection to a state member of an Associate and Advisory Committee creating such a group, on an *ad hoc* basis, where needed.

At the outset, I suggested that the accomplishments of the American Bar Association have been primarily attributable to the work of its committees, including the committees of its several Sections. When we view the current year from the vantage point of August, 1959, the success of this Association year also will reflect the effectiveness of the action of its committees. I hope that it will be outstanding.

Action of the House of Delegates with Reference to Canon 35

A great deal of interest has been expressed in the action of the House of Delegates in directing appointment by the President of a new nine-member Special Committee of the Association to study further the problems involved in the proposed amendment of Canon 35 of the Canons of Judicial Ethics. The Committee is to report the results of its studies and surveys, as well as its recommendations, to the House of Delegates as "early as feasible". The action of the House of Delegates was taken on recommendation of the Board of Governors and expressly authorizes the Committee "to conduct such surveys with the prior approval of the Board of Governors as may be deemed

(Continued on page 952)

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American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $3.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $5.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $16.00 for lawyers first admitted to the Bar in 1952 or before; $8.00 for lawyers admitted between 1953 and 1955; and $4.00 for lawyers admitted in 1956 or later.

Manuscripts for the Journal

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

American Bar Association

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■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

Important Cases Go to the Federal Courts?

I take exception to the conclusion and inference reached by Judge Alexander Holtzoff as pertaining to the latter portion of the next to the last paragraph of his book review of *The Advocate's Devil*, appearing in the July, 1958 (44 A.B.A.J. 673), issue of the AMERICAN BAR ASSOCIATION JOURNAL, the pertinent part being ". . . the tendency is for more and more important litigation to go into the federal courts".

In my judgment such an observation constitutes a self-serving declaration, and the inferences to be drawn therefrom are an insult to our state judiciary. In Virginia, in my opinion, such a condition does not exist as to litigation, and I do not apprehend any pilgrimage to the federal court in the foreseeable future.

I wonder if the view expressed by Judge Holtzoff is not characteristic of the federal judiciary, and exemplifies the tenor of thought in Federal Government, which apparently subscribes to the doctrine of complete abrogation of states' rights. . . .

LEWIS H. HALL, JR.

Newport News, Virginia

Publicity and Functioning Committees

As part of an alleged bar public relations program, the Association sponsored a day, Law Day. But if a program of public relations for the Bar as a whole has been established, which lawyers, much less laymen, can cite it?

Those of us who read Association announcements may remember that there is a Committee on Communist Tactics, Strategy and Objectives and a Committee on American Citizenship. Some may even know who head these committees. But personal publicity, even if merited, is not as important as publicity for the work which needs to be done.

If any public relations work has been done, news of accomplishment has eluded me. It certainly has not intruded on the public consciousness.

A public furor recently developed over an invitation by the Baltimore Bar Association to Soviet Ambassador Menshikov. If in its zeal to accomplish something worthwhile, the local association did not know how to handle the situation, did either of the Committees named, solicited or not, step in to assist? Were they ready and in position to advise? Specific and helpful measures could have been proposed. One can only wonder whether our Committees lack the ability to help or the energy.

This criticism is not born of personal antagonism: I am not personally acquainted with the men whom I am here criticizing. But when, in reply to a general suggestion which I offered, the President of the Association indicated sufficient interest to transmit my comments to the Chairman of the Committee on Communist Tactics, I declared the possibility that there would be no worthwhile follow-up or that I might not even receive a reply.

That statement was based on prior experience; it was accurate. The instant criticism has this in common with other comments which I have offered from time to time, some of them most graciously received: all have been born of a desire to be of service to the profession, to our country and to mankind as a whole. Having assumed the responsibility which accompanies appointment, individuals and groups are duty bound to fulfill such responsibility.

LLOYD BUCHANAN

Washington, D. C.

Law Day and the Supreme Court

President Eisenhower proclaimed May 1, 1958, as "Law Day—U. S. A.", "a day of national dedication to the principles of government under laws". The American Bar Association urged all the members of the legal profession to memorialize the day. The profession did, in fact, lead in its observance. This was altogether fitting and proper for, the love held by the legal profession for liberty is notable—it has always been dangerous to the enemies of freedom!

Edmund Burke, warning Britain of the qualities which made the colonies dangerous, listed among them their love of the legal profession; many of the Founding Fathers were lawyers. Indeed, had there not been lawyers of principle and force, many of the great causes vindicating the rights of our people would not have reached the Supreme Court or would have done so without the illumination their arguments and briefs shed on great problems of democratic government. They know well that it was John Marshall, the architect of American constitutionalism, and his illustrious successors, who evolved the Supreme Court's function of review by "carrying the law into the neighboring field of statecraft in clarifying the fundamental principles underlying our system". The present Court's renewed insistence on inviolable individual rights as an integral part of our free society, and the reaffirmance of its duty to hold co-ordinate branches of government as well as the states within constitutional bounds when they attempt to invade such rights, should be reassuring to lawyers.

On that account, the failure of law-

(Continued on page 928)

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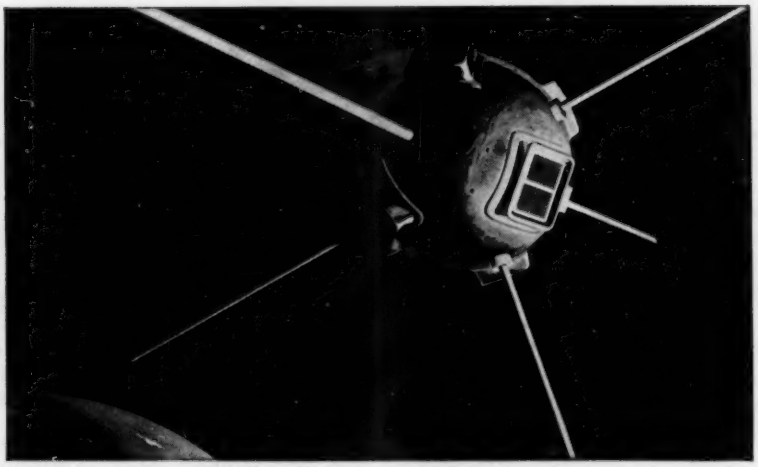
How the Bell System's Transistor Has Created Business and Jobs in Many Industries



NEWS FROM OUTER SPACE. One of the many uses for the Transistor is in the radio transmitters in satellites. Some other uses of this mighty mite of electronics, in addition to its growing use in telephony, are in hearing aids, personal radios, automobile radios, portable TV sets, phonographs, clocks, watches, toys, computers, data processing, machine tooling controls and even a guidance system for a chicken-feeding cart. A most important use is in a wide range of military equipment, including radar and guidance systems for missiles. Though little larger than a pea, the Transistor can amplify electric signals up to 100,000 times.

It has been just a little over ten years since the Bell Telephone Laboratories announced the invention of the Transistor.

This amazing little electronic amplifier was recognized immediately as one of the big breakthroughs in science that come only at rare intervals. Every year since its birth it has opened new fields of use and progress.

Developed originally for telephony, where its first use was in Direct Distance Dialing, the Transistor has enabled many other industries to bring out entirely new products and improve others. It has also made it possible for a number of new businesses to get started and to grow.

There is no doubt that the Transistor has been one of the leading forces in an electronics boom and is in considerable part responsible for raising the electronics industry from a two billion dollar level in 1946 to over thirteen billion dollars in 1958.

The Bell System has licensed more than seventy companies to make and sell transistors. More than 50,000,000 will be made this year.

The Transistor is just one example of how the basic research of the Bell Telephone Laboratories contributes to the economy and progress of the country. Frequently this constant search for new knowledge to improve communications brings forth discoveries of great value to other industries and the whole field of technology.

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McGRAW EDISON

(Continued from page 920)

yers—generally—Bench and Bar—to defend the United States Supreme Court against almost incredible vituperation, and their own intemperate criticism, because of recent civil liberties decisions, is greatly disturbing. To be sure, there have been exceptions. Mr. Charles Rhyne, President of the American Bar Association, is a conspicuous example. And distinguished jurists at the recent Notre Dame Law School symposium defended the Court; they pointed out that the attacks on it were, at best, based on ignorance of its functioning, and, at worst, an assault on the integrity of its members.

The cases which have brought on such violent criticism are a high-water mark in our constitutional history! In interposing the barrier of procedural safeguards between the power of the state and the right of the individual, when the latter is unjustly or unnecessarily invaded, the judiciary performs its highest function. In insisting that the basic privileges of the individual are the primary concern of government, these decisions will leave their imprint on the whole pattern of the American idea for all time! They have been vindicating "due process", the "law of the land" which we are to celebrate!

"Due process" with its underlying moral content is not merely a legal technique. It is basic to the American way of life. Its essence is the legal imperative based on a moral one that good ends must be secured only by good means—desirable results by just expedients; otherwise, the means contaminate the ends.

The Supreme Court has renewed its "role as monitor of national sanity". It is, as others before it, of a composite nature—not complected by the Presidents but rather by time in the context of need—representing a cross-section of America. This is well. For, in essence, its function is to maintain the nation in harmony with the enlightened consensus of our people. As President Hutcheson of Lafayette College put it, America's center of "Emotional integrity is to be found not in kings or in state religions but rather in its constitution sustained by the Supreme Court".

Each generation, with the Supreme Court as its effective agent—as "guardian of liberty"—must redefine as well as defend its liberties. Lord Acton pointed out, "Liberty is something never established for the future; but something which each age must provide for itself." The effort to renew it, to channel its change and to control its pace, requires the guidance of magnanimity as well as wisdom to mediate and conciliate among contending factors and factions.

Lawyers of good will, therefore, have a unique opportunity. Bench and Bar—and instructors in the law—should render clear the meaning of the recent civil liberty decisions as aspects of free institutions. This will serve to revive Americans' awareness of their rights and corresponding obligations—by reason of our system of law and courts. It will strengthen our country's re-

dedication to the rule of law as the foundation of our free society!

SAMUEL H. HOFSTADTER
Supreme Court of New York
New York, New York

Let's Act— Not Talk

I read Mr. Nilsson's article: "Revitalizing Citizenship: A Citizen's Duties to His Country" (44 A.B.A.J. 517). One cannot take issue with its purpose. One cannot cavil against being reminded of the history and development of our Constitution. Mr. Nilsson though, is guilty of two glaring errors —one of omission and the other of commission.

In his introduction, he, like Ichabod Crane, "jumps on his horse and rides off in all directions". In listing the causes for World War II, he includes "the weakening of self-discipline by 'progressive' education, the burial of American history and principles of government in a mass of 'social studies' ". This is the error of commission.

Lawyers should be masters of semantics. They should eschew looseness of language and employment of irrelevant generalities. I neither seek to defend nor praise progressive education and the system of social studies adopted in the schools today. No intelligent person wholly praises nor condemns progressive education, which has almost as many definitions as sponsors. The words "social studies" are as loose fitting and unbecoming as the modern female chemise and sack dresses. If Mr. Nilsson has some desire to vent his spleen upon aspects of modern education, let him confine such catharsis to a direct attack and not drag it by the heels into an article on Americanism.

Progressive education, no matter what the definition, was not in vogue during the era from 1914 to 1930, when most of our present political leaders and statesmen received their education. It was also during this period that Communism, Fascism and Nazism were aborning, but during that era those of my generation were not being educated about the dangers of these forms of totalitarian government.

There are three words used by many educators: "Telling Isn't Teaching". People learn by living and doing. We

of the older generation, were exposed to a barrage of oratory and forensic displays on July 4 for innumerable years. None of it seems to have registered to any extent. If it had, Mr. Nilsson would not have been moved to write his article.

I think Harry Emerson Fosdick said: "Christianity hasn't failed, it hasn't even been tried yet". The attainment of the basic principles upon which our Republic stands will be achieved only by deeds rather than pious protestations. Mr. Nilsson quotes James 2: 16-20: "Faith without works is dead". This is the error of omission. What are the deeds that we are to perform? We will find the solution to our problems by *living* according to the books rather than by reading them.

We are suffering today because we did nothing to halt Hitler, or prevent the Fascist-Communist decimation of Spain. We do nothing to improve the moral character of political life in this country. We do very little to remove the petty graft and corruption that exists in many of the lower courts throughout the country. We do nothing to break the stranglehold of politicians in the selection of political appointees, especially in the lower echelons. We do nothing to replace morality for political expediency in our State Department's activities.

We did little to prevent the growth of McCarthyism and left the fight to a fearless few. We seek curbs for the Supreme Court but none to curb a few (the exception fortunately) congressional committees who have run amuck in the past. What are we doing to remove from our tax laws the favoritism to oil companies and other inequalities? These are amongst the problems and tasks to which Mr. Nilsson should have addressed himself. These are the causes to which he should exhort us for action.

Every lawyer, especially in his early years, should be made to serve an interneship as a public defender, as a member of slum clearance agencies, as a member of mental health societies and other branches of social service, even as a magistrate or justice of the peace.

How many lawyers fight the powers of state-wide sheriffs' associations and for the abolition of overlapping courts of limited jurisdiction? Let every lawyer become a knight in shining armour, even tilt his lance against windmills, because only by doing this in his early years will he approach an understanding of the problems of his less fortunate fellowmen and of the republic envisioned by our Founding Fathers. We will be beset by articles twenty years from now similar to Mr. Nilsson's unless we *do* something about making democracy live (à la Pearson) rather than *speaking* about it.

SEYMOUR B. LIEBMAN
Miami Beach, Florida

Let's Ratify World Government Now

Let us suppose that: an unofficial group wrote a proposed world federal constitution, and persuaded Ceylon, Burma and Ghana to ratify it; then

The Netherlands and Switzerland adopted it after campaigns in which the pros and cons were publicly debated; then Spain, Bolivia and several other tyrannies ratified it; then the states of Utah and Massachusetts ratified an amendment to the U.S. Constitution explaining that the U.S.A. would join the federation as soon as the requisite number of nations ratified the world federal constitution; then forty other states achieved a similar ratification; then Congress endorsed it to complete ratification by the U.S.A.; then Russia ratified; then all other nations ratified; and the world federation began functioning.

The significance of an official constitutional convention has been stressed often. One way of understanding the possibility of success through an unofficially prepared but officially ratified constitution is by the analysis of situations in reverse chronology.

If Russia, U.S.A., Spain, Switzerland and Ceylon had previously ratified a specific world federal constitution, the debates in England would emphasize the advantages and disadvantages of the operations of the contemplated federal government and not who attended the constitutional convention. Law is dependent upon the acceptance of law, not upon its authorship. As soon as there has been significant acceptance, the origins of law are ignored.

If three fourths of the state legislatures of the U.S.A. had ratified an appropriate amendment to the U.S. Constitution, then Congress could be persuaded readily to endorse such action to complete the U.S. ratification. Politicians welcome the opportunity of jumping on the bandwagon for whatever is assured of success. Politicians refuse to let their hands be tied as to future actions as long as there is any uncertainty about which way affairs are going.

Approximately 10 per cent of U.S.A. voters have isolationist sentiments, and although they would undoubtedly pour millions of dollars into a campaign to oppose ratification in the thirty-sixth, thirty-fifth or thirty-fourth state to ratify, they would necessarily fail if the constitution had the correct politi-

cal appeal and fairness to merit ratification. The opponents would undoubtedly focus more attention on the possible dangers from the ultimate operation of the federation than on the unofficial authorship of the document.

Most of the nations of the world have governments which can essentially ignore popular opinion and act in accordance with what is advantageous to tyrants. If a world federal constitution were sufficiently attractive to such dictators, their speedy ratification could be assured.

The world federalist movement has strength in certain European democratic nations. The real battle for the success of the unofficially prepared constitution might be fought in those areas. If prior thereto, the constitution had been ratified by some of the neutral nations, the debates about whether ratification was desirable would be concerned about the fairness of the proposal, and no amount of ridicule of the audacity of the authors could overcome the appeal to the common sense of the European voter.

Some of the neutral nations might be induced to ratify speedily partly because of their desire to achieve the propaganda advantage of demonstrating how ready they were to help humanity. If ratification involved an inescapable commitment to participate as soon as the constitution was adequately ratified, federalists would not be concerned with the motives which brought about the initial ratifications.

Many persons who would have rejected the U.N. Charter on its merits felt obligated to ratify it because the San Francisco Convention eliminated the possibility of creating immediately any other kind of a world organization. An unofficially prepared constitution could only succeed on its merits. Several unofficially prepared constitutions might simultaneously compete for ratification. In any event, the ultimately adopted constitution would be better because of taking the issues directly to the people of the democratic nations instead of expecting the compromises of secret conferences of diplomats to achieve the most durable framework.

Although the probabilities for the failure of any specific attempt to create a new organization are enormously great, the existence of a possibility for success should stimulate an effort to devise a constitution to which both tyrants and radical advocates for the rights of the common man would eagerly volunteer their support. Much greater imagination is needed for creating the formulas attractive to the adherents of contradictory philosophies. Who has enough sympathy and understanding for all the many minorities who might obstruct the ratification campaign to invent a blueprint acceptable to all? Such persons are needed to write the world federal constitution and to initiate the campaign for ratification now.

JOHN R. EWBANK
Southampton, Pennsylvania

No Legislation To Enforce the Canons

Many members of the Association will doubtless take issue with some of Mr. Max J. Luther's views as expressed

(Continued on page 934)

(Continued from page 932)

in his article, "The Problem of Solicitation", in the June issue of the JOURNAL (44 A.B.A.J. 554). Just as every ethical lawyer deplores the unethical practices of some "ambulance chasers", he likewise deplores legislation which compromises his integrity when he happens to be handling a plaintiff's personal injury case. I refer, of course, to Mr. Luther's suggested "procedural provisions" in personal injury cases.

I have heard that unethical and unfair practices have become a problem in the handling (by both sides) of personal injury cases in some of the larger metropolitan areas. If this is so, the traditional self-discipline by the local bar associations, with the assistance of the courts, should be enforced all the more strongly; if these practices amount to criminal activity, certainly a local bar association has enough influence to see that the lawyer-lawbreaker is prosecuted. But, let us not delude ourselves by thinking that legislation which further degrades the profession is the answer.

LEONARD FUHRER
Alexandria, Louisiana

Sovereign Immunity Is Not Universal

The article by William H. Reeves, "Good Fences and Good Neighbors: Restraints on Immunity of Sovereigns", in the June issue of the JOURNAL (44 A.B.A.J. 521) leaves the reader with a rather perplexing picture as to just what are the problems encountered with the assertion of sovereign immunity. His discourse does not differentiate clearly between the domestic and the international enigmas that must be considered. A private person within the United States desiring to bring a legal action against the National Government presents a singularly domestic situation. Whether he has a cause of action and a pursuable legal remedy depends entirely on the legislative will (within the grants of, and limitations on, legislative power as enumerated in the Constitution). By means of the Federal Tort Claims Act, the Tucker Act, and other more restricted pieces of legislation, Congress has seen fit to establish a regular process whereby such domestic injuries can be redressed. This machinery virtually eliminates the immunity of the sovereign that existed under feudal common law.

When one of the disputants is a foreign government, either in name or actuality, the truly controversial problems of sovereign immunity are encountered. Of course the resolution of the International Bar Association, even if adopted, does not represent any multilateral legislation on this subject, and at best will be merely an ethereal statement as to what the law should be. In this connection, it should be pointed out that existing concepts of how far the protection of sovereign immunity extends differ considerably among nations. For example, Italy and Belgium have for some time denied such immunity with activities *jure gestionis* in nature, whereas Great Britain has adhered to the classical common law

theory of sovereign immunity.

The reader should be aware that the Tate letter setting forth the State Department's theory of restrictive sovereign immunity has not been consistently followed in this country to date, and the field remains one in which the Executive Branch of the Government in its conduct of our foreign affairs plays an extremely active role. Considering the pitfalls on this subject awaiting the practitioner, it can only be said: Be wary of generalities and oversimplifications about sovereign immunity if a foreign state is involved in your action. This is one area where the law is far from settled.

WILLIAM R. NELSON
Captain, U.S.A.F.
United States Military Academy
West Point, New York

More People Use Services of the Doctor

I recently received the July, 1958, issue of the AMERICAN BAR ASSOCIATION JOURNAL and have just finished, with interest, the article entitled "Professional Income; Why Doctors Make More Money Than Lawyers".

I believe that the author's recommendations are sound, but it has occurred to me that there might be another factor in this problem that also contributes to the apparent disparity in income.

I have no statistics to support my opinion, but it does seem apparent that the entire population in the United States uses the services of doctors, whereas only a fractional part of that population uses the services of attorneys. Without going into the reasons why this should be and whether or not the trend over the last thirty or forty years has been increasing in this regard, it would seem that probably as a result of this situation more money is spent in the United States on medical services than on legal services. If this in fact is correct, then the doctors would certainly have more income to divide than the lawyers, and this I believe would account, at least in part, for the differences shown in statistics presented in said article.

JOHN NEIL STANLEY
Santa Ana, California

World Peace Through Law:

The President's Annual Address

by **Charles S. Rhyne** • ***President of the American Bar Association, 1957-1958***

This is President Rhyne's Annual Address, delivered at Los Angeles at the opening session of the Assembly, in accordance with the Association's By-laws which require the President to address the Annual Meeting "upon such topic as he may select with the approval of the Board of Governors".

The privilege of serving this great Association as its President is an honor for which I shall always be most grateful. These past thirteen months have been an interesting, rewarding, and gratifying experience. I earnestly hope that those who evaluate the record since London will conclude that this has been a period of progress for the Association's programs of service to the public and to the legal profession.

The presidential addresses of my predecessors have considered the contemporary facts of their day and the duties and responsibilities thrust upon lawyers by the great issues and problems of their time. These distinguished Presidents of our Association have challenged our profession to face up to those issues and to solve the legal problems which arose therefrom. In emulation of precedent I now speak of the number one problem of mankind in the world today: how to achieve and maintain world peace.

As a foundation for my thesis that peace between nations may be achieved and maintained through use of the rule of law in a new world-wide system of courts, it is helpful to recall the rapid forward rush of events in our era of unprecedented change. History teaches that these dramatic new advances are mere promises and preludes to even greater achievements in the future. One who would postulate any plan to solve any problem of our day must therefore also look beyond the present to the new horizons and the new frontiers envisioned by the world in which we now live.

1. The World Today

We live at a turning point in the history of civilization—in a time when the whole world is being made over socially, economically, scientifically and even intellectually. Our era has witnessed such dramatic achievements as flight faster than sound, the splitting of the atom, miracle drugs, satellites in space, and many others. Rapid and turbulent changes in the scientific, economic and social fields, almost too numerous to name, daily defy evaluation on the basis of prior standards and experience. Vistas of endless space have opened as man's horizons have widened to encompass the universe. At a pace beyond dreaming the whole pattern of our existence is being reshaped. As we inventory our strengths and weaknesses we must conclude that concepts of the past are no firm foothold for the dynamic present and the uncertain future.

Amid tremendous developments for good and evil, a revolution in international affairs is taking place. Due to rapid communications and transportation, ours is a physically indivisible world. Age-old barriers such as seas and mountains, weather and climate, even time and distance, are fading into insignificance. The many economic relations and intellectual exchanges between nations are steadily increasing. The birth of new nations, and the newly won independent status of other nations, have created a rising tide of intense nationalism and anti-colonialism.

The whole world is involved in an accelerated industrialism and caught up in a tide of rising expectations. Yet there are vast discrepancies of economic development with widespread poverty, hunger and disease. The world Communist conspiracy is capitalizing on a growing spirit of rebellion against social and racial discriminations and low living standards. But while we can deplore this Communist exploitation of human misery, we cannot condemn the social and economic aspirations of millions of human beings. We applaud their desire to compress centuries of social and economic development into mere decades and wish to aid them in

achieving that goal.

The International Communist Conspiracy has extended its colonial empire to include one third of the people of the world, and it is working constantly to further its plan for complete world domination. The Kremlin has achieved its major conquests not by force of arms but by subverting the minds of men through political, economic and sociological warfare and other subversive tactics. These tactics create an almost constant crisis and tension. Communist words are used for concealment and confusion rather than enlightenment. The peril from false Communist propaganda is putting the very idea of a free society to its greatest test in all history. In a world where strength resides in man's mind, not his muscle, the loss of the fight for the minds of men could mean disaster. Yet peoples in other countries, and in our own country all too often fail to recognize this threat to their freedom in this new guise.

The use of mass-psychology headline barrages is a major diplomatic development of our era. But people have grown weary of the constant strife and bickering in international affairs. In this situation wrong concepts may sometimes be unknowingly accepted. A man who gets wrong concepts, whether from reading misleading charges and countercharges, or otherwise, cannot fail to arrive at wrong conclusions. Thus many of our people are often bewildered and benumbed to the point where they react apathetically to even clear statements of the Communist menace.

We have been forced into spending billions on military expansion in an ever-accelerating arms race with Russia. Every such arms race in all history has ended sooner or later in war. We live constantly on the brink of catastrophe as we go from crisis to crisis. The Damoclean sword hanging over all the wonderful scientific achievements of our era is the knowledge that man's achievement could lead to the suicidal extinguishment of the human race. No one doubts that an all-out nuclear war today would be so incredibly destructive as to produce mass extermination.

As we listen to the roar of current history it is absolutely clear that mankind—men, and nations, and races—must learn to live together or else see civilization as we know it perish in the senseless devastation of war. The atomic and hydrogen bombs, the ICBM's, the Sputniks, the Explorers, and Vanguards have attuned the minds of the people of the world to an overwhelming desire for peace which is stronger than such desire at any other time in all history. There is a growing realization that if the holocaust of all-out war explodes, every man, woman and child will be in the front lines for the first time since the Indian wars. The cause of peace is thus the cause of human survival.

Today, when man has learned how to destroy the world, his greatest need is for instrumentalities and institutions which can save mankind from the mass extermination of nuclear war. The sands of time have about run out in the hourglass of our civilization. Few will dispute that the number one problem of our day is how to achieve and maintain true peace. This situation presents a unique and unparalleled opportunity to lawyers, for it is the rule of law which contains the key to a peaceful world.

2. Mankind's Number One Need: A Workable Plan for Peace

It is obvious that to secure for mankind the marvelous benefits provided and promised by present-day civilization, and avoid the evils and dangers which hover over the earth from pole to pole, the greatest need of the world today is a workable plan to achieve and maintain peace. We must realize the inescapable fact that peace does not prevail in the world today. The existing situation has been described by Sir Winston Churchill as a "truce" maintained by "mutual terror", by President Eisenhower as a status of "balanced terror", and by others as military deterrence based upon "retaliatory terror". But no matter how it is described and by whom, it is not peace.

Peace means something more than the absence of war, something better than the truce in which we now live. The difference between a peace and a truce is that where there is peace there is no fear and no threat.

3. The Machinery Now Used Has Not Created Peace

A look at the policy of the United States today reveals that our government is maintaining the current truce through (1) military force, (2) diplomatic negotiations, agreements and treaties, (3) trade and aid, (4) the United Nations and alliances with friendly nations, and (5) measures designed to offset Communist propaganda. But all of this together has not achieved true peace.

Weapons of horror cannot either guarantee the security of our nation or form a foundation for peace.

The chessboard of diplomacy has not achieved peace.

Artificial barriers to the free flow of trade between nations present seemingly insoluble problems.

Financial aid has not always brought us friends, for friendship, among men or among nations, cannot be bought.

The United Nations has performed magnificently within its limitations, but it is out of date, and cannot even prevent little wars, nor even slow down the ever-accelerating arms race with its threatened consequences.

We are being far outstripped in the propaganda field by adversaries who use the very cry for peace as a propaganda weapon. We have not resharpened the truth into an effective instrument of combat against the "big lie" technique utilized by the Kremlin. And even a winning effort in the propaganda war will not bring peace.

No one can successfully contend that this existing machinery, which has brought only a truce so far, is an effective plan for peace. International tensions, anxieties, fears and threats are the lead story in nearly every news medium day by day. They are increasing rather than on the wane. And there is no prospect for improvement through the instrumentalities now in use. Man's number one problem remains how to end the buildup of "hot" and "cold" weapons in such a way that peace may prevail. The stalemate of the current "standpatism" of our foreign

policy must be broken. And the existing apparatus of our cold war effort certainly does not provide a formula for such a breakthrough.

To end the ever accelerating arms race before mutual doom replaces the truce of mutual terror, we must go beyond the instrumentalities and institutions used in the past and adopt a new approach—a new plan—for peace. We must look forward, not backward. We must make a new start based upon a new concept. We must think and act boldly and meaningfully to adapt our peace-seeking effort to the realities of today and tomorrow.

I do not say we should abandon our diplomacy, our weapons, our agreements, or our other present mechanisms, but simply that we must go beyond them and do the job they have not done.

We cannot stand still and let the world-dissolving time-bomb of all-out nuclear war explode. Our circumstances are urgent. The time for forward movement toward peace and away from war is now. The opportunity to move in that direction may be lost forever if we do not grasp it while we can.

Charles S. Rhyne

4. A Universally Comprehensible New Plan: The Rule of Law

To pull the world out of its present drift toward destruction, and to set it on the path of progress toward peace, a dramatic new approach to peace is essential. Such a plan must capture and fire the imagination of men the world around. It must be a plan which all peoples can understand. It must be related, therefore, to their ordinary everyday knowledge and experience. Settlement of international disputes through law in the courts is such a plan.

"Law" and "courts" are universal terms all men comprehend. All peoples know the law and courts have proved their worth as a keeper of the peace within nations. They will readily grasp the concept, content and the value of this plan of going to court instead of to war. They know what law and the courts have done nationally, and if proper leadership is given they can be brought to see what law can do internationally.

5. Law Is Civilization's Best Concept To Create Peace

An evaluation of the ideas, ideals, and concepts which mankind has developed since the dawn of history leads to the inescapable conclusion that the rule of law offers the best attainable route to peace. In a world sundered by differences of language, color, creed and belief, and by background in diverse forms of government, the rule of law is the one concept universally understood as an ideal nearly all men have in common on a world-wide basis. It therefore offers a common ground which mankind possesses upon which to erect an edifice for peace.

In the beginning of social order, disputes between man and man were settled under the rule of the jungle by brute strength. Later sticks and stones were used, then spears and arrows, then guns and powder. Today in all civilized nations, disputes between man and man are settled in the courts under the rule of law. But the law of the jungle still prevails as the ultimate mechanism to settle disputes between nations.

Of all human concepts, law has the best historical claim as an instrument to satisfy the need for peace and order. Man knows that peace reigns where law prevails. People everywhere experience law's use almost daily in courts in their local communities. Out on the vast new frontier of the international community, disputes previously settled by the bloodbath of war must come to be settled by similar tribunals of justice.

Man has not realized what law can do for him internationally, and that is the reason why law has not been used in this field as it can and must be. The basic ungrasped fact of our time is that the lack of the rule of

law in the world community is today the greatest gap in the growing structure of civilization. A community, whether local, national or international community, disputes previous-national, can become and remain peaceful only so long as it is subject to the rule of law. Down through the ages, people have lived in terror and fear wherever the rule of law has not prevailed within nations. And this is true today in nations under Communist domination. We of our generation must find a way to implement the best answer to our difficult problem of gether before—in an outburst of lawlessness—we dissolve together in nuclear flame.

6. The Rule of Law Defined

The rule of law is not a new concept. There is no mystery about its principles. Throughout the recorded history of mankind the rule of law has meant the application of reason and fairness.[1] All peoples understand it to carry such a connotation. They know it means a decision according to what is morally right to insure liberty, equality and justice in relationships between man and man and between man and government. It will have the same meaning when applied between nation and nation.

Contrary to the thinking of many, the principles of our Constitution, including our renowned Bill of Rights, do not represent original ideas created by the draftsmen thereof. The Constitution is in fact a restatement of the principles of the rule of law as borrowed from the great lawgivers of the ages. The world and our nation have changed beyond the imagination of the writers of our Constitution, yet their restatement in that great document of the fundamental principles of the rule of law still stands relatively unchanged. This firm foundation in the wisdom of the centuries is the reason our Constitution of basic legal principles has been able to meet the ever-changing needs of our rapidly growing and expanding nation.

A study of Hammurabi's Babylon Code of 2100 B. C., the law of Moses in 1450 B. C., Justinian's Roman Codes of A. D. 600, and Magna Carta in A. D. 1215 reveals that there is no basic difference in the legal principles espoused by the great lawgivers of the ages. A survey of the writings of Solon (600 B. C.), Confucius (500 B. C.), Skotaku Taishi (A. D. 600), Bracton (A. D. 1250). Bartolus (A. D. 1350), Colbert (A. D. 1165), and other celebrated legal scholars down through the centuries, reveals that in all the great legal systems (*i.e.*, Chinese, Hindu, Hebrew, Greek, Roman, Germanic, Japanese, Islamic, Slavic, civil and common law) there is no fundamental difference in concept of the underlying legal principles. The rule of law has no boundaries, and is of its very nature international in character.[2]

There is no need to await the writing of an elaborate new code of international law[3] before utilization of the rule of law in the settlement of disputes between nations. To wait until a written code is perfected and accepted could delay interminably the progress toward world peace through law. The fact is the utilization of the principles of the rule of law could begin today.[4]

The rule of law of which I speak is applied daily by all lawyers in assessing the legal problems they evaluate. It is not law known only to "international lawyers" under the mysterious title of "international law". The fight for application of the rule of law internationally—or, to state it more bluntly, the fight for mankind's survival through law—is therefore the duty and responsibility of every lawyer. None can shirk this task on a plea of ignorance or lack of experience. All lawyers know the rule of law of which I speak. All lawyers therefore share the responsibility that flows from that knowledge.

7. Law Plus a World Court System

History reveals that success in the use of the instrumentality of law has always required the institution of a court system.

For Moses to have received the Ten Commandments on Mount Sinai and then to have done nothing about them would have rendered them worthless. Moses realized his responsibility and set about preaching and teaching the value of living under the law. He also created an excellent system of courts. He knew that the law could not function to end friction without a court system. The message and work of Moses should be an inspiration to us lawyers of today. But unless we set up the courts to use the rule of law internationally the lesson taught by Moses will have been wasted.

History also teaches that creation of a court system must precede disarmament within nations. One excellent illustration of this lesson is what happened in England where only after the King's Courts were created, and had proved their worth, did the Lords and the Barons dissolve their armies and let the courts decide their disputes. Another illustration is what took place in the western part of our own country where, after the courts began to function, disarmament for both the "good" and "bad" men gradually came about.

The law is in many ways like a giant river. A river can run on for generations with slight use for navigation, and it is only when the river is harnessed for hydroelectric power development that tremendous service and its greater potential for the benefit of mankind is realized. So it is with law. Law has been around since time

(Continued on page 997)

1. Aristotle defined the rule of law as "intelligence without passion". Bodenheimer, JURISPRUDENCE (1940), page 44.

2. Briefly in THE LAW OF NATIONS (1955), writes:
"... It was out of the conception of a law of nature that the early writers on international law developed their systems ... under a terminology which has ceased to be familiar to us the phrase stands for something which no progressive system of law ever does or ever can discard." (Page 16).
"... Over against the theory of sovereignty, standing for the new nationalistic separation of the states of Europe, was set the theory of a law of nature denying their irresponsibility and the finality of their independence of one another ... the belief that, in spite of all appearances the whole universe, and included in it the relations of sovereigns to one another, must be ruled by law, remained ..." (pages 18-19).

3. The International Law Commission is compiling and codifying the rules of law in many fields of international intercourse. Where applicable such codifications should be considered along with the principles of the rule of law in deciding any case before any international court. As Dean Pound has said so well: "The vital, the enduring part of the law is in principles—starting points of reasoning—not in rules. Principles remain relatively constant or develop along constant lines. Rules have relatively short lives. They do not develop. They are repealed and are superseded by other rules."

4. Briefly, *supra*, note 2, says at page 68: "... International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find ... the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals."

Constitutional Law:

The Papers of the Executive Branch

by William P. Rogers • *Attorney General of the United States*

This is a statement by Attorney General Rogers on the right of the Executive Branch to withhold documents and other materials from Congress. The Attorney General made this statement before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on March 8. The position taken by Mr. Rogers was that the executive right to withhold materials from Congress springs from the doctrine of separation of powers.

I appreciate the opportunity of appearing before this Senate Committee to present my views as to the extent of the inquiry which can be made by the legislative branch of the Government concerning the decision making process and documents of the Executive Branch. As might be expected from the division of our Government into three separate branches, this question has arisen from time to time from the very earliest days of our national government.

I. Current Principles and Practices

In the Justice Department over a period of time we have made a very careful study of numerous incidents which have occurred and which illustrate many facets of the problem. Before getting into a discussion of historical precedents and principles, however, I should like to acquaint the committee with my general views and with the particular practices we have followed and are following in the Department of Justice.

We live in a democracy in which an informed public opinion is absolutely essential to the survival of our nation and our form of government. It likewise is true that Congress must be well informed if it is to do its legislative job realistically and effectively. The vast majority of requests by Congress for information from the Executive Branch, as you know, are honored quickly and complied with fully. The furnishing of such information is beneficial to Congress, the Executive Branch and to the people themselves. In the Department of Justice we strive to furnish Congress with the requested information, and to make public that part of our activities which would be of interest to the public and which properly can be disclosed without interfering with the discharge of our duties and responsibilities or which might be improper or violate the canons of ethics.

With reference to the right of the public to know generally as distinguished from the Legislative Branch, it seems to me that there are four principles which it is well to keep in mind:

1. While the people are entitled to the fullest disclosure possible, this right, like freedom of speech or press, is not absolute or without limitations. Disclosure must always be consistent with the national security and the public interest.
2. In recognizing a right to withhold information, the approach must be not how much can legitimately be withheld, but rather how little must necessarily be withheld. We injure no one but ourselves if we do not make thoughtful judgments in the classification process.
3. A determination that certain information should be withheld must be premised upon valid reasons and disclosure should promptly be made when it appears that the factors justifying non-disclosure no longer pertain.
4. Non-disclosure can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal or pecuniary reasons.

All persons agree that information which would adversely affect our national security should not be disclosed. Then too there are compelling reasons for non-disclosure in the field of foreign affairs, in the area of pending litigation and investigations which may lead to litigation, information made confidential by statute, investigative files and reports, and, finally, in-

formation relating to internal government affairs. President Eisenhower's letter of May 17, 1954, to the Secretary of Defense concerns this last category of information.

With reference to this last category, at Marquette University two years ago I stated my views on this subject and they have not changed:

> . . . Just as no private citizen or business entity can conduct its business under constant public scrutiny, so judges, legislators or executive officials cannot conduct all public business at every step of the way in public.
>
> A considerable part of Government business relates to the formulation of policy and to the rendering of advice to the President or to agency heads. Interdepartmental memoranda, advisory opinions, recommendations of subordinates, informal working papers, material in personnel files, and the like, cannot be subject to disclosure if there is to be any orderly system of government. This may be quite frustrating to the outsider at times. No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of nondisclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment need to be subjected to publicity. Obviously, they cannot be if Government is to function.[1]

This question was discussed about a year ago by a former government lawyer who wrote:

> There are serious weaknesses in the assumption . . . that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter. . . . The executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberation incidental to the making of policy decisions. Undoubtedly the official who makes such a decision should be answerable to Congress for its wisdom. But the subordinate civil servants who advise him must be answerable only to him. . . .
>
> * * *
>
> It is one thing for a cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public; it is quite another thing for a middle-aged, middle-ranking civil servant, who needs his job, to do so. The Secretary's own responsibility to Congress for wrong decisions is a sufficient guarantee that he will not long tolerate incompetent or disloyal advisers; and he is certainly in a much better position to detect such undesirables than is any member, or even any committee of Congress.[2]

Jenkin Lloyd Jones, Editor of the *Tulsa Tribune* and formerly President of the American Society of Newspaper Editors, in delivering the William Allen White Lecture at the University of Kansas last February had this to say:

> Many of my colleagues in the newspaper business have leaped to the conclusion that all public affairs, not directly connected with national defense, must be conducted in the open. . . . I disagree. I think that much of the important business in a Republican form of government will be carried on behind closed doors. I see few dangers in that. I see many advantages. For it is only behind closed doors . . . that most politicians—yea, even statesmen—honestly express their views and try to get at the meat of the question.
>
> I don't mean to imply that legislative voting should not be in the open, nor that the public should be denied the right to appear before all committees, nor that any legislator should be excused from explaining why he voted as he did. But I do mean that . . . in the National Capitol, the White House, and various Washington departments no sound policy is decided upon without frank exchange of views. And a frank exchange of views is rarely reached with the public and the press looking over the shoulders of the policy makers.
>
> The Government of Athens was an absolute and complete democracy, with all deliberations carried on in a goldfish bowl of open debate. But Athens became smothered with oratory, paralyzed with demagoguery, and finally wound up with such an unstable mobocracy that nearly every able Athenian was banished from the land.

In the Department of Justice we have in the last few years taken certain steps to make available more information about our daily operations than was available before. For example, we have now the practice of making all pardons and commutations of sentences a matter of public record. Thus in the event a question arises as to the propriety of a pardon, any interested person may examine the record, which now includes the names of all persons who interceded on behalf of or expressed interest in the convicted person. Similarly, at the conclusion or settlement of any type of case in the Department, where otherwise there would be no public record of the proceeding, our practice now is to make all the pertinent facts available.

We in the Department of Justice as the attorneys for the Executive Branch of government have a special obligation with regard to litigation. This is well expressed in the Canons of Professional Ethics of the American Bar Association. Canon 37 provides in pertinent part:

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of those confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. . .

On May 17, 1954, President Eisenhower in a letter to the Secretary of Defense set forth basic policies which

1. The speech is reproduced in 40 Marq. L. Rev. 83-91 (1956).

2. Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L.J. 487-488 (1957).

I should like to discuss in detail later. However, let me say now that this letter imposes no barrier to the disclosure of any official action. The end product of advice may be produced, where otherwise permissible, in response to an appropriate request for information as to what official action has been taken by the Executive Branch. This is a sound rule based upon his duty and authority under the Constitution; it is supported by the precedents in our national history; and it is in accord with the judicial decisions that our Federal Government is composed of three equal and co-ordinate branches, and that no one of the three branches shall encroach upon another.

Now let me turn to the historical precedents and then discuss the fundamental principle of separation of powers, and lastly some specific legislative proposals which have been made.

II. Precedents and Principles

Let us start by noting the action of the Continental Congress under the Articles of Confederation which preceded the adoption of the Constitution. On February 21, 1782, some 176 years ago, the Continental Congress passed a resolution creating a Department of Foreign Affairs under the direction of a Secretary to the United States of America for the Department of Foreign Affairs. The Resolution provided:

> That the books, records and other papers of the United States, that relate to this Department be committed to his custody, to which and all other papers of his office, any member of Congress shall have access; provided that no copy shall be taken of matters of a secret nature without the special leave of Congress.

Moreover, the same Resolution also provided:

> That letters [of the Secretary] to the ministers of the United States, or ministers of foreign powers which have a direct reference to treaties or conventions proposed to be entered into, or instructions relative thereto, or other great national objects, shall be submitted to the inspection and receive the approbation of Congress before they shall be transmitted.[3]

In short, under the Continental Congress, the Department of Foreign Affairs and its Secretary were almost completely subject to the directions of the Continental Congress. Every member of the Continental Congress was entitled to see anything in the records of the Department of Foreign Affairs, including secret matters. Indeed, he could make a copy of anything, except secret matters.

Much has been written of the inadequacies of that prototype of our national government. I do not propose to review those writings or to comment on those inadequacies.

Suffice it to say that it came increasingly to be recognized by the leaders of our country then that the design of that pilot plant had grave and serious defects which made it incapable of serving adequately as the engine of the national government. The designers so discovered by practical experience with its shortcomings.

Finally, at the Constitutional Convention in Philadelphia in 1787 that prototype was redesigned as the engine of government which is still operating today. As we all know, it was designed on the principle that our Federal Government is divided into three equal departments or branches, a political innovation not included in the older Articles of Confederation.

Now let us see what action the opening session of the First Congress of the United States took when it came to create the Department of Foreign Affairs under the Constitution. Section 4 of the Act of July 27, 1789, establishing an Executive Department, to be denominated the Department of Foreign Affairs, provides:

> . . That the Secretary . . . shall forthwith after his appointment, be entitled to have the custody and charge of all records, books and papers in the office of Secretary for the Department of Foreign Affairs, heretofore established by the United States in Congress assembled. [1 Stat. 29.]

Compare this language with the resolution creating the old Department of Foreign Affairs under the Articles of Confederation. Here is no language which makes the books and records of the Department of Foreign Affairs virtually the books and records of Congress; here is no language which requires that the Secretary of this department shall submit his correspondence to Congress before transmittal. The difference is obvious and fundamental. Under the Constitution the First Congress was creating a Foreign Affairs Department of the *Executive Branch*, pursuant to the grand design of the new Constitution based on the political principle of separation of powers.

William P. Rogers

The difference in the language of the old resolution and the new statute under the Constitution is no matter of legislative oversight. Many of the men who sat in that First Congress had served earlier in the Continental Congress where they had the right of access to the papers of various departments, because those departments were in legal effect merely creatures of the Congress. In the light of their knowledge of the earlier practice, it can only be concluded that they deliberately recognized that the continuance of that former privilege was incompatible with the grand design of the Constitution for the separation of powers between the three branches.

The question of the production of documents before Congress arose in George Washington's first term as President. The first investigation by the Legislative Branch of the administration of governmental affairs by the Executive Branch was an investigation of a military expedition led by General

3. 7 JOURNALS OF CONGRESS 219.

St. Clair under the direction of the Secretary of War. When the congressional committee called for the papers pertaining to this campaign, President Washington convened his Cabinet, because it was the first instance of a demand on the Executive Branch for papers, and so far as it should become a precedent he wished it to be right.

Washington did not question the propriety of the investigation, but said that he could conceive that there might be papers of so secret a nature that they should not be given up. He and his Cabinet came to a unanimous conclusion:

> First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.

Having formulated these principles, the Cabinet agreed, however, that "There was not a paper which might not be properly produced."[4] It is, of course, well known that acting on the same principles Washington later refused to lay before the House a copy which it had requested of instructions to the United States Minister who negotiated a treaty with the British Crown. In declining to do so, because of the secrecy required in negotiations with foreign governments, Washington referred to his constitutional oath to "preserve, protect, and defend the Constitution", and to his belief that

> it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.[5]

Thus there were established four principles:

1. That the Constitution fixes boundaries between the three branches of the Government: Legislative, Executive and Judicial.
2. That the documents of the Executive Branch are within the control of that branch, not of all branches.
3. That the Legislative Branch can make inquiry of the Executive for its documents, but in response to congressional requests for documents, the Executive should exercise a discretion as to whether their production would serve a public good or would be contrary to the public interest.
4. That the authority of the President for the conduct of foreign affairs does not oblige him to produce the instructions which had been given to his representatives in negotiating a treaty. It seems clear that they constituted advice within the Executive Branch on official matters. The official action of the Executive was embodied in the Treaty which was submitted to the Senate for its advice and consent.

So were the basic principles fixed in the Administration of our first President when both the Executive and Legislative Branches were comprised of many men who had served in the Continental Congress, who had participated in the Constitutional Convention and who successfully assisted in achieving the ratification of the Constitution.

Jefferson, who had participated in the formulation of these principles as Secretary of State, was also confronted with the same question during his Presidency when the Burr conspiracy was stirring the country. By resolution the House asked for any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching certain matters related to the Burr conspiracy, although it was not so identified. Jefferson gave certain information, but declined to give certain other information as being ex parte and uncorroborated and delivered in some instances under the restriction of private confidence.

Thus two additional principles were established:

1. That documents containing information of uncertain reliability apparently reflecting adversely on individuals should not be disclosed.
2. That documents containing information given in confidence to the Executive Branch should not be disclosed by that Branch.

Some forty years later, the House of Representatives was conducting an investigation of the administration of Cherokee Indian affairs. In a special message dated January 31, 1843, President Tyler vigorously asserted that the House of Representatives could not call upon the Executive for information, even though it related to a subject of the deliberations of the House, if, by so doing, it attempted to interfere with the discretion of the President.[6]

President Tyler's refusal established additional principles:

1. That it would be contrary to the public interest for the Executive Branch to produce documents which might affect its settlement of pending claims against the United States.
2. That it would be contrary to the public interest for the Executive Branch to produce documents on official matters before they had been embodied in official actions.

In addition, it reaffirmed the principle that it would be contrary to the public interest to produce ex parte documents which apparently reflect adversely on individuals.

Again some forty years later, in challenging the attitude that because the executive departments were created by Congress, the latter had any supervisory powers over them, President Cleveland declared:

> I do not suppose that the public offices of the United States are regulated or controlled in their relations to either House of Congress by the fact that they were created by laws enacted by themselves. It must be that these instrumentalities were created for the benefit of the people and to answer the general purposes of government under the Constitution and the laws, and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the

(Continued on page 1007)

4. Writings of Thomas Jefferson, 303-305.
5. 1 Richardson, Messages and Papers of the Presidents, 196 (1896).
6. 3 Hinds' Precedents of the House of Representatives 181 (1907).

Administrative Law:

The "Substantial Evidence" Rule

by **Frank E. Cooper** • *of the Michigan Bar (Detroit)*

In reviewing findings of fact, the appellate federal courts have evolved two different tests for setting aside findings alleged to be erroneous. In appeals from District Courts, the question is whether the findings are "clearly erroneous", while on appeals from administrative agencies, the issue is whether the findings are supported by "substantial evidence". Mr. Cooper argues that the difference between the "substantial evidence" and "clear error" rules is the difference between Tweedledum and Tweedledee and that the former should be abandoned as impractical and difficult to administer.

The formula of "substantial evidence on the whole record" should be abandoned as the criterion of judicial review of administrative findings of fact. The superficial plausibility of this doctrine[1] does not justify its retention. In accordance with the recommendations of the Hoover Commission Task Force on Legal Services and Procedure, it should be replaced by a rule allowing the reviewing courts to set aside administrative findings of fact determined to be clearly erroneous.

Such, in broad outline, are the conclusions indicated by a study recently completed by a seminar group at the University of Michigan Law School,[2] whose members undertook to read and analyze 188 cases decided by the Federal Courts of Appeals in the five-year period 1951-1956 involving the application of the "substantial evidence" test.[3]

The purpose of this paper, reporting the results of the study, is two-fold:

(1) To indicate the basis afforded in court decisions for the conclusion above suggested;

(2) To analyze the factors that persuade courts to hold the evidence cited in support of a challenged administrative finding to be "substantial" or otherwise.

The first purpose, thus, is evangelical in nature. But the second purpose (which is based on the assumption that the suggested reform may not soon be accomplished) is the practical one of affording guidance in the argument of cases involving the application of the present rule.

The principal defects in the "substantial evidence" rule, as disclosed by an examination of the decisions seeking to apply it in reviewing administrative determinations, are four in number. They will be summarized, and then discussed separately.

(1) Many judges find it most difficult to distinguish between the "substantial evidence" and "clear error" tests. Attempts to differentiate between the two tests produce confusion for Bench and Bar alike.

(2) The "substantial evidence" formula has not provided an objective criterion of review, nor one capable of precise and uniform application. It is applied differently in the several Judicial Circuits, and even within the same Circuit it produces disparate results—different standards of "substantiality" are applied to different agencies.

(3) Further confusion is caused by the circumstance that too many lawyers—both on and off the Bench—seek to use the "substantial evidence" test as a touchstone for the decision of cases where the question does not really involve the correctness of the findings of fact, but rather the reasonableness of the inference drawn from those findings. In the latter instance, the "substantial evidence" rule does not properly apply at all.

(4) The "substantiality" test has been evolved with particular reference to review of N.L.R.B. decisions. The overwhelming majority of the cases applying the "substantiality" test concerns appeals from orders of this agency. Difficulties have been caused when an attempt is made to apply to the determinations of other agencies (where the factual findings have an entirely different content and character) the principles worked out with reference to judicial review of N.L.R.B. orders.

1. The phrase was born as a compromise reflecting a bitter struggle between opposed schools of thought in the formative years of 1941-46. It was first given shape and content in 1951 by the landmark Supreme Court opinion in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456 (1951).

2. Members of the group included Messrs. L. J. Colling, A. P. Fichera, A. Haswell, D. B. King, D. D. Lodwick, S. N. Shukla, D. W. Smith, N. W. Stroup, J. D. Sullivan, T. M. Utchen, and B. S. Wayburn. Philip A. Fleming, now of the Washington, D.C. Bar, was chief research assistant.

3. An effort was made to find all the cases involving reversals of administrative findings on the ground that they were not supported by substantial evidence; some may have been overlooked.

Substitution of the "clear error" test for the "substantiality" rule would, it appears, go far toward correcting these four defects.

The "clear error" test is, in the first place, easier to understand and comparatively concise. The courts find it easier to apply. So do lawyers. As a result of long experience with the "clear error" test as applied upon review of findings by Federal District Judges, there is a general understanding as to what must be shown to establish that findings are "clearly erroneous". While not mathematically precise, the "clear error" test has been demonstrated as a workable device, capable of comparatively uniform application in all Circuits and in all types of cases.

Further, adoption of the "clear error" test would avoid the difficulties inherent in the attempt to apply the "substantiality" rule in cases where the issue concerns the reasonableness or validity of inferences drawn from established facts.

Finally, it appears that in most cases the reviewing court would reach the same result whichever test were applied. It may be inferred, accordingly, that if reviewing courts were granted power to set aside administrative findings of fact determined to be clearly erroneous, such grant would not unduly interfere with the respect accorded administrative expertise.[4]

I. Comparison Between "Substantial Evidence" and "Clear Error" Rules

Any discussion of the comparative merits of the two rules must be predicated upon some understanding of the differences between them. Just what these differences are is far from clear.

In the classic statement of the clear error rule[5] the Court says that a finding is clearly erroneous when the reviewing court "is left with a definite and firm conviction that a mistake has been committed".

The contemporary version of the "substantial evidence" rule originated in *Universal Camera Corp.* v. *N.L.R.B.*[6] It authorizes the reviewing court to set aside administrative findings of fact when—and only when—the court (after taking "into account whatever in the record fairly detracts from" the weight of the evidence supporting an agency's findings of basic facts) is left with the conviction that "the record . . . clearly precludes" the agency's "decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both".

Hitherto, it has generally been presumed that a court empowered to set aside findings determined to be "clearly erroneous" enjoyed substantially broader powers of review than it would have if it were limited to setting aside findings determined to be "unsupported by substantial evidence on the record considered as a whole". The classic formulation of the two rules, as above quoted, appears to support this supposition. However, a close analysis of the decided cases indicates (although this conclusion is not susceptible of conclusive demonstration) that despite the clear theoretical difference between the rules, nevertheless in most cases the court would reach the same result if it applied the "clear error" test rather than the "substantial evidence" test.

(1) The Theoretical Difference in the Rules

At the legalistic level of logomachy, the two rules are quite different and distinct,[7] and perhaps the logical distinction has, in practice, some operative effect.

Employment of the "substantial evidence" formula may engender a different attitude of mind from that evoked by the "clear error" phrase. Perhaps a court feels a greater degree of restraint when it speaks in terms of the "substantiality" or "insubstantiality" of the evidence, than when it is required only to decide whether the error of the lower tribunal, in its findings of fact, is "clear."[8] Conceivably, in a close case a court might say that while the findings were clearly erroneous they were nonetheless supported by substantial evidence.

However, no such case has been found, and the conclusion is quite clearly indicated that where the court believes the administrative finding is *clearly* and definitely erroneous, it can almost always find that the supporting evidence is not substantial.

Furthermore, none of the cases suggesting that there is a distinction between the two rules states precisely what the distinction is.

The reason that the courts have not described the assumed distinction, it would seem, is that the judges are uncertain what the distinction, if any, is.

(2) Courts Uncertain as to What Distinction Really Amounts to

Judge Soper, in an oft-quoted concurring opinion in the *Southland Manufacturing Company* case (4th Cir. 1952), 201 F. 2d 244, declares that "the mental processes of the reviewing authority which are called into action in each situation are so similar that they can hardly be distinguished".

In *Rubin Brothers Footwear, Inc.* v. *N.L.R.B.* (5th Cir. 1953), 203 F. 2d 486, where a majority of the court found the evidence supporting an administrative finding to be less than

4. Apart from the reasons suggested by this specific study, other considerations might be urged in favor of allowing reviewing courts to reverse administrative findings of fact determined to be clearly erroneous. Several of them were summarized in the Report of the Hoover Commission Task Force on Legal Services and Procedures: "The substantial evidence rule was developed by the courts for the review of administrative orders because such orders commonly were based upon proceedings which did not conform to the evidentiary rules applicable in the judicial process. In the typical administrative proceeding evidence could be entered which might properly be excluded if offered before a trial court. The voluminous administrative record could not always be examined with the same degree of care and thoroughness that the reviewing court would normally apply to the record of the trial court. Some abbreviated method of review had to be developed to prevent the judiciary from becoming overwhelmed by the flood of appeals from administrative decisions based upon records which defied systematic fact evaluation. . . . When, however, the administrative process is brought into reasonable relation to the judicial process, and records are compiled by competent presiding officers, the need for restrictive judicial review largely disappears. There no longer exists a compelling reason for giving the person who appeals from administrative decisions a review of substantially less scope than he would receive in an appeal from the decision of a trial court. . . ." (REPORT, 1955, page 215).

5. *United States* v. *U.S. Gypsum Company*, 333 U.S. 364, at 395, 68 S. Ct. 525 (1948).

6. 340 U.S. 474, 71 S. Ct. 456 (1951).

7. Judge Parker of the Court of Appeals for the Fourth Circuit found that there is not even "anything analogous" between the two rules. *N.L.R.B.* v. *Southland Mfg. Co.* (4th Cir. 1952), 201 F. 2d 244.

8. Senator Taft, one of the principal congressional proponents of the move for broader judicial review of administrative fact finding, expressed the thought during the debates in Congress that under the "substantial evidence" test the reviewing court could not go "quite so far" as under the "clear error" test. See footnote 21, Supreme Court's opinion in *Universal Camera*, 340 U.S. 474, 71 S. Ct. 456 (1951). The Supreme Court appeared to assume in the *Universal Camera* case—compare the language at pages 485 and 492 of its opinion—that there was some difference between the two rules. A similar suggestion is perhaps hinted at by the language employed by the Court in *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358, at page 364, 75 S. Ct. 855 (1955), although this is susceptible to the interpretation that it is directed only to the agency's review of the initial decision of the hearing examiner.

substantial, Judge Rives, dissenting, protested that the other members of the court were confusing the two rules and were reversing the agency because they were convinced that its determination was clearly erroneous, despite the fact that it was supported by some evidence which, in the opinion of Judge Rives, could be deemed substantial.

(3) Evidence Not "Substantial" Where Finding Is "Clearly Erroneous"

Indications of the tendency of the Courts of Appeals to equate the two tests and to characterize the evidence as not "substantial" if the court believes that the finding is "clearly erroneous" may be seen in a number of typical cases.

In several cases where a court was applying the "substantial evidence" test, the opinion employed language characteristic of the "clear error" test. Thus, in *United States Steel Company* v. *N.L.R.B.* (7th Cir. 1952), 196 F. 2d 459, at 465, in holding the evidence to be less than substantial the court declared: "We think the Board was clearly in error." Similarly, in *Farmers Co-operative Company* v. *N.L.R.B.* (8th Cir. 1953), 208 F. 2d 296, at 303, in explaining why it ruled the evidence to be less than substantial, the court said that it had read the entire record in order to fulfill its duty "to determine insofar as is humanly possible what the truth is" and that having performed that duty the court "can reach no conclusion other than that the examiner and the Board erred". Again, in *National Labor Relations Board* v. *International Broadcasting Company* (5th Cir. 1954), 209 F. 2d 912, at 913, the court held the supporting evidence to be "insubstantial" in support of the Board's conclusion that employees had been discharged to discourage unionization, because "the evidence *shows clearly* that the employer had just cause to discharge these employees" (italics supplied).

In short, in a number of cases where the courts hold the evidence to be less than substantial, the only explanation given for the conclusion is that the administrative finding is clearly erroneous.

In *N.L.R.B.* v. *Trinity Steel Company* (5th Cir. 1954), 214 F. 2d 120, at 123, the court, noting the judicial "responsibility to see that the Board keeps within reasonable grounds" appears to hold that if the administrative finding is "unreasonable" it is not supported by substantial evidence. The court added that the Board "clearly erred".

(4) Evidence Is "Substantial" Where Finding Is Not "Clearly Erroneous"

Conversely, in cases where the courts hold the administrative finding to be supported by substantial evidence, it is frequently said that the evidence is substantial because the court has not been convinced that the administrative finding is clearly erroneous. Thus, in *N.L.R.B.* v. *Radio Officers' Union* (2d Cir. 1952), 196 F. 2d 960, at 962, the court declared: "the record contains nothing which would justify holding the findings to be clearly erroneous; hence they are supported by 'substantial evidence' ". Similarly, in *Consolidated Royal Chemical Corp.* v. *F.T.C.* (7th Cir. 1951), 191 F. 2d 896, at 900, the court found the evidence to be substantial because "we certainly cannot say from an examination of the whole record that the decision of the Commission was *clearly* wrong" (italics supplied).

In short, we find identification of the "substantial evidence" and "clear error" rules both in cases where the court finds that the evidence is substantial and also in those where the court finds that the evidence is not substantial.

(5) Finding Is "Clearly Erroneous" If Not Supported by "Substantial Evidence"

Turning to cases where the court is applying the "clear error" rule (*e.g.*, in reviewing findings of district judges), we find a like confusion between the two rules.

In many of these cases the courts say that a finding is clearly erroneous if there is no substantial evidence to support it.[9]

After having studied all of the cases applying the substantial evidence rule, members of the seminar group read the thirty-eight cases in which during the last five years Courts of Appeals

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reversed or modified decisions of Federal District Courts under the "clear error" rule. On the basis of the composite opinion of the group, in twenty-four of those thirty-eight cases it appeared reasonably clear that the same result would have been reached under the "substantial evidence" test; and in only five cases did it appear that the result might have been different (in the remaining nine cases, the nature of the court's opinion made it impossible to reach any conclusion whether a different result might likely have been reached under the "substantial evidence" test).

(6) The Rule-of-Thumb Test

The cases studied vindicate the rule-of-thumb test commonly employed by practicing attorneys, *viz:* if the appellant can convince the appellate court that the administrative finding of facts is obviously just plain wrong, and if the appellant can at the same time arouse the court with a zealous desire to correct the error, the court can always find means to do so, whatever labels must be applied.

9. *Freightways, Inc.* v. *Stafford* (8th Cir., 1955), 217 F. 2d 831; *Baltimore Dairy Lunch* v. *United States* (8th Cir., 1956), 231 F. 2d 870; *Marcella* v. *Commissioner of Internal Revenue* (8th Cir., 1955), 222 F. 2d 878, at 881.

II. The Rule Does Not Provide a Uniform Criterion of Review

Perhaps the clearest demonstration of the fact that the "substantial evidence" doctrine does not afford an objective criterion of decision or one capable of precise and uniform application, is to be had by looking at the record. The table reproduced below summarizes the rulings of all the Courts of Appeals, with respect to all the federal agencies. The figures are significant.

Mere coincidence cannot account for the fact that out of twenty-nine cases considered by the Court of Appeals for the Second Circuit, the administrative finding was deemed to have substantial evidentiary support in twenty-six cases (89 per cent), whereas in only 45 per cent of the cases decided by the Court of Appeals for the Fifth Circuit (fifteen out of thirty-three) was the administrative finding deemed to be supported by substantial evidence. It would seem that a difference in judicial attitude toward the proper scope of review of administrative fact finding must account for such wide differences in result.

In the First, Second, Third, Fourth and Tenth Circuits, it will be noted, the administrative finding of fact is upheld in the great majority of cases. The same is true in the Court of Appeals for the District of Columbia Circuit. Only in the Fifth and Sixth Circuits do reversals outnumber affirmances. In the Seventh and Eighth Circuits the chances of reversal are more evenly balanced. The Ninth Circuit leans somewhat toward an "affirming attitude"—but not nearly so noticeably as the courts along the Atlantic seaboard.

The always debatable inferences from statistical analysis may be strengthened, in this instance, by quotations from judicial opinions.[10]

In some circuits, it is said that the "substantial evidence" rule does not "permit" the court to "review the facts"; while in others it is deemed the duty of the court to ascertain "what the true facts are", so that the court may determine whether the agency erred. In some Circuits, the inference of the agency will be upheld unless there is no doubt but that it is invalid; while in others, if either of opposed inferences could reasonably be made, the agency must choose the inference in respondent's favor.

What better evidence is needed that the "substantial evidence" test means different things in different circuits?

Even within the same Circuit, the Court may exhibit different attitudes toward different agencies.[11]

III. Inapplicability of "Substantial Evidence" Rule to Findings Based on Inference

The classical formulation of the "substantial evidence" rule is apt in its application to findings of "basic facts", so-called; but it does not lend itself to meaningful application to findings which represent inferences derived

10. The following statements indicate the general attitude of the Second and Fourth Circuit Courts of Appeal (both "affirming" courts):

In *N.L.R.B.* v. *James Thompson & Co.* (2d Cir., 1953), 208 F. 2d 743, at 746, the Court said: "Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not because we felt satisfied that we should have come out the same way, had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test."

In similar vein, the Court of Appeals for the Fourth Circuit held in *N.L.R.B.* v. *Southland Mfg. Co.* (1952), 201 F. 2d 244, that upon appeal from administrative findings the Court was without power to "review the facts". The same court added in *Charleston Shipyards, Inc.* v. *Lawson* (1955), 227 F. 2d 110, at 113: "It must be remembered that the resolution of factual controversies . . . is the primary responsibility of the Deputy Commissioner . . . and this rule extends not only to the facts which the Deputy Commissioner may find but also to the inferences which he may draw from them. . . . If there is any doubt whether the findings and the inferences of the Deputy Commissioner are supported, that doubt must be resolved in his favor."

Contrariwise, the Court of Appeals for the Fifth Circuit (a "reversing" court) declared, in *N.L.R.B.* v. *Houston Chronicle Publishing Co.* (1954), 211 F. 2d 848, at 854: "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. . . . If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted. . . ."

And the Court of Appeals for the Eighth Circuit (which affirms more often than it reverses) held in *Farmers Co-operative Co.* v. *N.L.R.B.* (1953), 208 F. 2d 296 at 303: ". . . it is the duty of this court to determine insofar as is humanly possible what the truth is [citing Universal Camera Corp.]; we have read the entire record with that duty in mind and can reach no conclusion other than that the examiner and the Board erred."

11. For example, the Court of Appeals for the Fourth Circuit in *N.L.R.B.* v. *Hart Cotton Mills* (1951), 190 F. 2d 964, at 974, criticized a finding of the N.L.R.B. in these words: "This conclusion is . . . based . . . upon inferences drawn from parts of the evidence while other parts of great significance have been ignored. We are therefore compelled to deny enforcement of the order because . . . it is the duty of the reviewing court, under the Administrative Procedure Act to . . . assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. . . ."

But the same Court accorded a higher measure of deference to findings of the Federal

				First		Second		Third		Fourth		Fifth		Sixth		Seventh		Eighth		Ninth		Tenth		D. C.	
AGENCY	TOTAL CASES	A	R	A	R	A	R	A	R	A	R	A	R	A	R	A	R	A	R	A	R	A	R	A	R
N.L.R.B.	139	93	46	6	1	21	3	9	1	4	1	14	16	2	4	7	7	9	7	13	4	5	1	3	1
F.T.C.	10	6	4			1		1					1			3	2				1			1	
L&H W COMP.	7	5	2			2				1		1	1				1							1	
F.C.C.	6	5	1																					5	1
F.P.C.	5	5	0							2						1		1						1	
C.A.B.	4	4	0																					4	
IMMIGRATION	3	3	0													2								1	
RY. RET. BD.	3	3	0							1						2									
I.C.C.	3	3	0											1						1		1			
S.E.C.	3	3	0	1		1														1					
FOOD & DRUG	3	2	1			1		1	1																
HEALTH	1	1	0					1																	
SEL. SERV.	1	0	1												1										
	188	133	55	7	1	26	3	12	2	8	1	15	18	3	5	15	10	10	7	15	5	6	1	16	2

from such basic facts.

For example: if the National Labor Relations Board finds that officers of a company refused to meet with representatives of a labor union representing its employees, the finding is one of "basic fact". Its correctness can be appraised in terms of the substantiality of the evidentiary (testimonial) facts tending to show whether or not there was in truth such a refusal. But an inference derived from this basic fact (and other like circumstantial evidence) that the company refused to bargain "in good faith" cannot well be gauged on the same basis. There is no specific evidence, one way or the other, bearing directly on this conclusion as to the "ultimate fact".

This is important, because in most cases the administrative findings attacked on appeal relate not to the "basic facts" but to the conclusions of "ultimate fact" derived therefrom.

(1) Supreme Court Dicta as to the Scope of Review of Inferences

In legal theory, the "substantial evidence" rule is applicable only where it is the agency's findings as to the "basic" facts that are under attack.

When the point of attack concerns the reasonableness of the *conclusions* inferred by the agency from its findings of basic fact, then the substantial evidence rule does not properly apply. The issue in such cases is whether the agency's inference "rests on erroneous legal foundations"[12] or is "without reasonable foundation".[13]

A number of Supreme Court cases decided shortly after the landmark *Universal Camera* case (340 U.S. 474, 71 S. Ct. 456 (1951), indicated that the review of *inferences*, as distinguished from a review of the substantiality of the evidence tending to support the findings of *basic* fact, is not broadened by the provisions of the Federal Administrative Procedure Act.[14]

These cases indicated that so long as the evidence tended fairly to support the agency's findings as to the *basic* facts, then the Agency's conclusions as to such statutory concepts as "refusal to bargain" or "discrimination" or "public interest, convenience, and necessity" (conclusions that are often described as findings of *ultimate* fact[15]) should not be set aside by the courts except in extraordinary cases, where the inference was palpably unjustifiable.

(2) In Practice, Inferences Freely Reviewed

However, examination of the cases decided by the Courts of Appeals discloses that the actual course of decision has been different. The Courts of Appeals, by applying the "substantial evidence" test to what are here termed findings of *ultimate* fact, have assumed greater powers to set aside agency inferences than the Supreme Court originally proposed. Perhaps the reason for this broadening of the scope of review —enabling the reviewing court to set aside inferences of ultimate fact deemed to be clearly erroneous—is to be found in the circumstance that there is no clear line of distinction between the *basic* and *ultimate* facts. Perhaps the reason lies in a belief on the part of the federal judiciary that this broadened scope of review is inherently desirable.

Because of the Supreme Court's apparently settled conviction that determination of the substantiality of the evidence is a function ordinarily committed to the sole consideration of the Courts of Appeals,[16] there has been no effort by the Supreme Court to check the tendency shown by several Courts of Appeals to use the "substantial evidence" test as a means of setting aside agency inferences deemed to be clearly erroneous.

In short, it might be suggested that while the Supreme Court originally suggested that the "substantial evidence" rule should not be utilized to broaden the scope of review of administrative inferences, it has at the same time declined to exercise its discretionary jurisdiction to review the application of the "substantial evidence" rule in the lower courts. The result of this appellate abstention is to give the Courts of Appeals a comparatively free hand in utilizing this ambivalent tool in such a way as to permit them to carve out the desired result in individual cases.

This tendency toward broader review of the inferences drawn by the agencies as to the "ultimate facts" is a healthy one, it is believed. Surely, it is in line with the recommendations of the Hoover Commission Task Force. The net result, by and large, is to permit the Courts of Appeals to reverse administrative findings based on inference wherever they appear to be clearly erroneous.

But utilization of the "substantial

(Continued on page 1001)

Power Commission in *United States ex. rel. Chapman* v. *F.P.C.* (1952), 191 F. 2d 796, at 808, observing: "The court may not . . . ignore the conclusions of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on matters of hydraulic engineering. It is in just such matters that the findings of the Commission, because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission."

The Court of Appeals for the District of Columbia Circuit likewise appears to exhibit a different attitude toward different agencies. In one case in which it set aside an order of the N.L.R.B., *Victor Products Corp.* v. *N.L.R.B.* (1953), 208 F. 2d 834, at 839, the court seemed to come close to weighing the evidence. It said: "In sum, there appears on the one hand the testimony of three responsible officials of the Company [concerning their interviews with discharged employees] . . . their testimony is supported by the language of the discharge slips, and it is clear from the testimony of at least five employees that there were interviews. On the other hand there is the testimony of one officer who had no part in the decisions and who learned what he knew from a person whom he could not identify. This, we think, presents a precise example of what the Congress and the Supreme Court means by substantial evidence upon the record as a whole. . . . The solid sense of the entire record does not support the Board's finding. The Board's finding might have been sustainable under the provisions of the Wagner Act. . . . But the provisions of . . . the Administrative Procedure Act . . were meant to foreclose such picking and choosing. . . ."

On the other hand, in reviewing a determination by the Federal Communications Commission, the same court declared in *Pinellas Broadcasting Company* v. *F.C.C.* (1956), 230 F. 2d 204, at 206: "The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary . . . and it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. . . . All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary."

12. *N.L.R.B.* v. *Babcock Wilcox & Co.*, 351 U.S. 105, 76 S. Ct. 679 (1956).

13. *N.L.R.B.* v. *Truitt Manufacturing Company*, 351 U.S. 149, 76 S. Ct. 753 (1956).

14. *E.g., Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 74 S. Ct. 323 (1954); *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 73 S. Ct. 361 (1953); *N.L.R.B.* v. *7-Up Bottling Company*, 344 U.S. 344, 73 S. Ct. 287 (1953); *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 71 S. Ct. 470 (1950).

15. The classic formulation of the nomenclature here employed is found in *Saginaw Broadcasting Co.* v. *F.C.C.* (D. C. Cir. 1938), 96 F. 2d 554.

16. See *F.T.C.* v. *Standard Oil Co.* (January 27, 1958), 355 U.S. 396. In *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 452 (1951), the Supreme Court declined to overturn the Court of Appeals determination that the evidence was not substantial even though "were we called upon to pass on the Board's conclusions in the first instance . . . we might well support the Board's conclusions". Even in such a case, said the Supreme Court, it would "adhere to the usual rule of non-interference". This declaration is significant, for the decision of the Court of Appeals in that case appeared to some commentators to involve something very much akin to an actual re-weighing of the evidence. See Jaffe: *Judicial Review: "Substantial Evidence on the Whole Record"*, 64 HARV. L. REV. 1233, at pages 1251-1255 (1951).

A Citizen's Duty:

Serving on the Jury

by Clarence K. Streit

This is a perceptive account of one man's experience as a juror. Mr. Streit's article gives a picture of the jury system that few lawyers know. His enthusiasm for the jury system is heartening at a time when so many of our institutions are under attack both at home and abroad.

Jury service is a duty most citizens apparently seek to escape, or wish they could. When I was summoned to serve as a juror in the federal courts in Washington, D. C., during the month of June, 1957, I, too, felt it was a burden. I don't any more.

Jury duty is the kind of basic common experience that all citizens—bar none—should have at least once. True, a juror spends much time waiting to be called on a case, but sitting through a trial as a member of the jury, and then seeking with the other eleven jurors to reach a just *and* unanimous verdict is a very enlightening and enriching experience.

Nothing else can give the education on some fundamental problems that you get on jury duty.

What Juries Face

Perhaps the most educational factor in jury duty is the obligation that the twelve jurors are under to do justice as each individually sees it, and yet be unanimous. In most trials there is much to be said for both sides. The evidence is conflicting, leaves much to be desired. The twelve jurors vary in their mentalities, temperaments, characters, general education and degree of experience or ignorance in the questions at issue. On their verdict can depend the life or liberty of others, large amounts of money, or important considerations of the public good. They may be so divided in their individual verdicts that it takes them several days of discussion among themselves to reach a unanimous verdict. In such conditions, many virtues are needed in the jury room.

Where Unanimity Takes Virtue

I have just sat as one of twelve jurors—none of whom had ever met before—locked in the jury room for three days, trying to reach a unanimous verdict in a case involving the shooting of one man by another and a claim for $100,000 damages. I recall no other personal experience shared with so many others which required in us each and jointly such a combination of fairness, common sense, moral courage, tact, open-mindedness, patience, malice toward none and charity for all (especially the jurors who differed most stubbornly from you), good humor, soul-searching through the night, tolerance, balance, willingness to listen to others and change one's verdict in the light of further knowledge, readiness to talk over and over the case in the frail hope of finding some overlooked fact or consideration that might bring agreement, respect for even a minority of one on any given point combined with respect for the view of the great majority—in short a "decent respect for the opinions" of others together with firmness in the right as God gives "to each one to see the right". It was reassuring to find how widespread, at least in a latent state, these virtues were in twelve strangers, drawn at random from the community, and forming a fair sampling of it.

Justice Easier for the Supreme Court

What else do we have that can teach, exercise and strengthen so much political, social, moral and religious virtue as does serving on a jury? Even the Justices of the United States Supreme Court—with profound respect to them—are not called on to equal what the jury is expected to do for justice. They are nine, not twelve. They are all highly educated and trained in the same field; they are all above 50, all the same sex and race. A typical jury is composed of both sexes, all adult ages, two races, persons ranging in education from grade school to university, and divided among at least half a dozen, if not a dozen occupations. Most important of all, the Supreme Court has the privilege of doing justice

by a five to four vote, but the jury has to do justice, individually and collectively, by a twelve to nothing verdict.

A "Must" for Foreigners

The Supreme Court is rightly considered one of the things in Washington to be seen by foreigners who would understand the United States. Some way should be found for acquainting them also with the working of the jury system. Justice rests on it.

Merely to look at the cross section of the community drawn at random to serve on the jury panel, is to learn how alive are the words, "We the People of the United States, in order to . . . establish justice. . . ." The foreigner would gain still more insight into American life if he could then see how a jury of twelve is picked from this panel to try an actual case, and how it functions. He would be even more impressed if he could pierce the secrecy of the jury room and listen while the twelve try to reach a unanimous verdict—but this is necessarily impossible.

Idea for a Film

The United States Information Service should have—if it doesn't—a good educational film designed to show how a typical jury panel and jury are chosen, how the jury operates and the discussion that goes on in the jury room before it reaches a verdict. Such a film would be highly educational, in fact, for most Americans. Meanwhile, I would warmly recommend seeing the film, *Twelve Angry Men*, all of whose drama unfolds in the jury room. The title, however misleads. It should be *Twelve Jurors*.

Cross-Section

The eight hundred summoned with me for jury duty were young, middle-aged and old, two thirds white and a third Negro, and about the same ratio of men to women. In the end about three hundred actually served, the rest being ineligible, disqualified or excused. Law in the District allows a woman to be excused permanently merely by claiming this privilege as a woman. When Chief Judge Bolitha Laws, who presided over the selection of the panel, asked if any desired to invoke this, I was pleased to see that only three used their sex to escape duty. All were white.

Lawyers Should Be Jurors

Lawyers are among those who are disqualified by their profession from jury duty. The reasons are evident; still, it seems to me a mistake not to require them at some time to have jury experience. No one needs this more than lawyers. It should be part of their training.

I believe it would be in the interests of justice to require that no one could be admitted to the Bar, or made a judge, or permitted to teach law, who had never served as a juror. Surely the education of any one who makes his career in the field of justice should include some personal experience as a juror. Special provision should be made to assure that those who are most concerned professionally with juries should have personal knowledge of the kind of problems that are faced in the jury room.

In the Jury Box

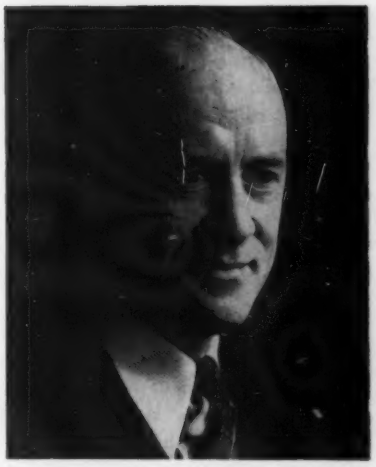
Once the jury panel for the month is chosen, it is divided by lot into two groups, one to serve in criminal and the other in civil cases. I drew the latter. After two days of waiting, I was among twenty-four called to report at Courtroom 2. There the case to be tried was explained and counsel for each side asked if any of us knew about it, or those involved, or had any reason to believe he could not give an impartial verdict. Each counsel could reject without cause three of us, but knew only the name, address and occupation of each and could hardly have identified any by name or race. Thus twelve of us were soon chosen and sworn in.

Race Relations

My first case as a juror would have interested particularly—and astounded—any foreigner. The plaintiff was a Negro, who charged he had been shot by one of the defendants, the manager of a cafe, and sought from him and his brother, its owner, $50,000 in compensatory and $50,000 in punitive damages for lasting injury he had suffered. The defendants were Negroes, so were their counsel and most of the witnesses, but the plaintiff's counsel was white. The jury was composed of eight men and four women, including one Negro and two Negresses. The Judge, John D. Martin, a Southerner born in Memphis, Tennessee, was on loan from the Memphis District. The case took several days before it went to the jury, which had sole power to decide whether the defendants were liable, and if so, the damages.

The first thing a jury does on retiring to its room is to elect a foreman to preside and speak for it. I was chosen for this post. We voted and discussed our differences for more than twenty hours, locked in the jury room. This time was spread over three days. No one slept well the nights in between. The case was difficult, the evidence contradictory, and we found room to differ even on the rules of law the Judge had told us to apply. We were deadlocked. Tempers grew edgy at times, and once one woman broke into tears.

The case involved race relations—especially in the jury. We had to live in very close contact with each other for days. I am happy to report that



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from the time the jury was chosen until it was finally discharged—as unable to reach a unanimous verdict—there was never the slightest thing to indicate that there is a race problem in the United States, let alone that segregation is a hot issue, and Washington is more Southern than Northern.

Model Judge

Judge Martin was a model of benign fairness. He showed equal respect and equally kindly consideration for all concerned. He told us that his fetish was the jury system. He said when he discharged us that, though disappointed at our inability to reach a verdict (as we were, too), he was pleased with the thorough consideration we had given the case. Had he been able to listen to our discussion, I think it would have confirmed his faith in juries. It did mine.

The Blind Could See

A blind man would never have known from listening either to the trial or—were that possible—to the prolonged deliberations of the twelve jurors, that the people he heard were from two races, or which person was white and which colored. He would have seen what no Communist could have seen—so incredible would it have been to the latter—that racial considerations led no juror of either color to favor the side whose lawyer had his own color. The blind would have seen, too, that never during the trial or jury deliberations did anyone ever seem to be acting on his good behavior, to mislead a foreigner, or making any effort to produce this very pleasing picture of unquestionably equal citizenship. The picture came out as naturally as a sunrise. I heard no juror comment on it. I doubt if any except me even noticed it. Yes, it would have seemed unbelievable to any foreigner—even non-Communist—who witnessed it. It would have astonished many Americans.

The President's Page

(Continued from page 916)

necessary to obtain reliable, factual data, and with authority to confer with representatives of the interested media". The resolution creating the Committee recites that, "the fundamental objective of the Committee and of all others interested must be to consider and make recommendations which will preserve the right of fair trial".

There is no question that has been under consideration by the House of Delegates in my experience which has aroused greater interest among members of the Bar than the question of photography in the courtroom. Persons of different points of view have sought to read special significance into the action taken by the House of Delegates at Los Angeles. It is my personal feeling that the action of the House of Delegates cannot be taken as any indication as to the action which ultimately will be taken by the House on the present or the proposed Canon. The House merely decided that in its judgment newly submitted reports and data from the media merited further study by a committee of the Association, and that the House of Delegates should have the benefit of a further study designed to obtain a "body of reliable factual data on the experience of judges and lawyers in courts where photography, televising or broadcasting has been permitted", before definitive action on Canon 35 is taken.

In appointing the members of the Committee, announcement of the personnel of which will be made before publication of this President's Page, I am seeking to select lawyers whose standing in the profession, experience and judgment will insure a report in which the Bar as a whole will have confidence.

I have been assured by representatives of the media affected that they will co-operate with our Committee in any manner possible, and will make available to it all information which they have bearing upon the questions with which the Committee will be dealing. Both the Board of Governors and the House of Delegates expressed as their fundamental objective and guiding policy the necessity for the preservation of the right of fair trial. I am confident that the Committee's action will give effect to that policy.

Committee on Court Congestion

In his outstanding address to the opening session of the Assembly in Los Angeles, the Chief Justice of the United States described the serious problem which faces the courts and the profession as the result of delays in obtaining trial in the state and federal courts in various parts of the United States. In spite of the fact that this vexing problem has been the subject of aggressive action by the Attorney General's Conference on Court Congestion, the Institute of Judicial Administration and other agencies on a national and local level, it has not been solved and stands as one of the most difficult facing the profession.

In recognition of the obligation of the organized Bar of the United States in this field, I recommended to the Board of Governors that it create a new Special Committee of the Association to attack the problem from the point of view of the practicing profession. The Board created the Committee which will become active immediately. It is hoped that the Association's Committee can make a real contribution to the solution of this problem, which, until solved, stands as an indictment of our profession for failure to make our system of justice function effectively.

The 1958 Ross Prize Essay:

Administrative Agencies and Judicial Powers

by **Roy L. Cole** • *of the Texas Bar (Dallas)*

This is the essay chosen by the judges as the best in the 1958 Ross Prize Essay Contest. The contest is held each year by the Association under the terms of the will of the late Judge Erskine M. Ross. The contest is conducted among members of the American Bar Association on a subject chosen by the Board of Governors. This year's subject was "To What Extent Should Administrative Agencies Exercise Judicial Powers?" The judges of the contest, traditionally a judge, a teacher of law and a practicing lawyer, were Warren E. Burger, Judge of the United States Court of Appeals for the District of Columbia Circuit; Dean Henry Brandis, Jr., of the University of North Carolina Law School; and David Berger, of the Philadelphia Bar.

I.

An administrative agency is customarily defined as any governmental authority, other than a court or legislature, which determines or directly affects the rights and obligations of private parties through rule-making or adjudication.[1] The First Congress in 1789 enacted three statutes granting administrative powers, two pertaining to customs and the third initiating the series of pension laws now administered by the Veterans' Administration.[2] Of the fifty-one authorities classified as administrative agencies in 1941 by the Attorney General's Committee on Administrative Procedure, eleven trace their beginnings to legislation enacted prior to the end of the Civil War,[3] but the tremendously powerful "independent" agencies, exercising broad control over nation-wide activities, are largely a development of the twentieth century. The modern history of the administrative agency dates from the creation of the Interstate Commerce Commission in 1887.[4] The Federal Reserve System was established in 1913,[5] the Federal Trade Commission in 1914,[6] the Federal Power Commission in 1920,[7] and the Board of Tax Appeals in 1924.[8] With the advent of the New Deal came such important agencies as the Federal Deposit Insurance Corporation,[9] the Securities and Exchange Commission,[10] the Social Security Board,[11] and the National Labor Relations Board.[12] World War II produced such powerful though temporary agencies as the Office of Price Administration, Office of Defense Transportation, the War Production Board and others. Still later came the tremendously important Atomic Energy Commission,[13] and Congress seems sure to establish a space commission to control our relations with the rest of the universe.

A characteristic of these administrative authorities is their exercise of what are historically termed "judicial powers"—the adjudication of controversies directly affecting private individuals. The grant of these powers has often been attributed to a failure of the common law courts to meet the great social problems arising from late nineteenth and early twentieth century industrialization—the individual's inability as a practical matter to obtain legal redress for wrongs committed against him by the new gigantic industrial combines, and the transition from a *laissez-faire* government to one assuming many affirmative responsibilities for the social and economic well-being

1. Report of the Attorney General's Committee on Administrative Procedure (1941), page 7; Kenneth C. Davis, Administrative Law (1951), page 1. The Administrative Procedure Act of 1946, 60 Stat. 237, 5 U.S.C. §1001 *et seq.*, defines an administrative agency as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia."—§2.

2. Act of July 31, 1789, 1 Stat. 29; Act of September 1, 1789, 1 Stat. 55; Act of September 29, 1789, 1 Stat. 95.

3. Report of the Attorney General's Committee on Administrative Procedure (1941), pages 8-10.

4. Act of February 4, 1887, 24 Stat. 379. First conceived of only as an instrument to cure and prevent the evils of excessive and discriminatory railroad rates, the ICC was in 1920 given specific congressional direction to insure that the industry provide adequate service to meet "the transportation needs of the country". Transportation Act of February 28, 1920, 41 Stat. 456, 486. For the Supreme Court's comment on this shift of purpose, see *Akron, C. and Y. R. Co. v. U.S.* (New England Divisions Case), 261 U.S. 184, 189-90, 67 L. ed. 605, 609-10 (1923).

5. Federal Reserve Act of 1913, 38 Stat. 251, 260.

6. Act of September 26, 1914, 38 Stat. 717.

7. Act of June 10, 1920, 41 Stat. 1063. Originally an ex-officio board of cabinet members, the FPC was reorganized as an independent agency by Act of June 23, 1930, 46 Stat. 797.

8. Revenue Act of 1924, 43 Stat. 253, 336, Title IX.

9. Banking Act of 1933, 48 Stat. 162, 168 (12B).

10. Act of June 6, 1934, 48 Stat. 881, 885, §4.

11. Act of August 14, 1935, 49 Stat. 620, 635, Title VII.

12. Act of July 5, 1935, 49 Stat. 449.

13. Atomic Energy Act of August 1, 1946, 60 Stat. 755, completely amended by Act of August 30, 1954, 68 Stat. 921.

of the populace as a whole.[14] Another and fairer analysis is that, while judicial failure was sometimes involved, administrative agencies have been created from time to time simply because in each particular situation such an authority seemed to practical men to be the most practical solution to the problem at hand.[15] Certainly the expressed and accepted specific reasons for administrative exercise of traditionally judicial powers are practical and varied ones, among them being:

(a) The need, in adjudication incidental to regulation of modern industrial complexes, for an expertise which can be developed only through the constant attention to a particular field which the courts are unable to give and with the assistance of large staffs whose combined skills cover all the various non-legal areas pertinent to the industries to be regulated.[16]

(b) The necessity for intelligent coordination between policy-making and enforcement.[17]

(c) The necessity of deciding controversies in fields affected by the public interest as "rightly" as possible, taking into account *all* relevant facts, not merely (as in the courts) those specially selected facts placed in the record by the adversary parties.[18]

(d) The tendency of the judiciary, drawn primarily from conservative, propertied classes, to resist legislative programs antipathetic to those classes even though clearly favored by the majority of the populace as a whole.[19]

(e) The tremendous volume of cases before some agencies which would so overwhelm the courts that they would find themselves unable to perform their normal and important tasks.[20]

II.

The American Bar in general early developed a dislike for the entire administrative process, an antagonism which continues among perhaps the majority of lawyers to this day. We have largely given up our earlier denunciations of "bureaucracy" and "socialism", but we have constantly maintained our attack on *all* administrative exercise of judicial powers, on the ground that such exercise violates the fundamental doctrine of separation of powers and thus imperils the even more fundamental "rule of law".[21]

These broadly based objections have had an almost astonishing lack of success in even retarding continual new and expanded grants of administrative judicial powers.[22] This is unfortunate, for administrative adjudication has clearly been carried too far, and a less all-inclusive but more penetrating criticism might have prevented the excesses. Compelling objections can be made to administrative adjudication by some types of agencies, but the standard sweeping condemnation of *all* administrative exercise of judicial powers is subject to so many valid rebuttals that its failure to have any effect becomes understandable.

First, the doctrine of separation of powers has never been recognized as absolute. The Constitution itself provides for such mixed powers as presidential veto, congressional rule of the District of Columbia, and senatorial trial of impeachment and consent to appointments and treaties. James Madison, the most famous constitutional lawyer of the immediate post-revolutionary days, recognized clearly that the government could operate efficiently only if made flexible through a blending of powers. His best-known statement on the subject, rejecting a rigid interpretation of the doctrines of Montesquieu, the "father of American separation of powers doctrine", contains these words:

> His [Montesquieu's] meaning, as his words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.[23]

From the First Congress on, blending of powers has been a characteristic of American government, accelerating in frequency since the 1880's because of the increasing complexity of our industrial economy, the rise of industrial combines and the inability of the individual to protect himself against their excesses. We need not fear this blending overmuch. It is compatible with and contributes to the real genius of the American government—the superb system of constant checks and balances which preserve our rights and liberties.[24]

Second, there is room for doubt as to the correctness of classifying all adjudication as an exercise of judicial power. Although most of us fundamentally believe in a kind of natural law, we realize that the adjudicatory process in the courts is not merely a matter of "discovering" pre-existing law, as Blackstone and his contemporaries maintained, but in the judge's choice of available alternatives amounts actually to making law, and always has. In the words of Theodore Roosevelt, approved by Cardozo:

> The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of

14. For example, see Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 16-18 (1936); Davis, ADMINISTRATIVE LAW (1951), page 5; James M. Landis, THE ADMINISTRATIVE PROCESS (1938), page 46. On the first point, President Franklin Roosevelt said, in vetoing the Walter-Logan Act in 1940: "Wherever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal."—House Doc. No. 986, 76th Cong., 3d Sess. 3 (1940).

15. Davis, ADMINISTRATIVE LAW (1951), pages 10-13. Also see Walter Gellhorn, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941), page 5.

16. Landis, *op. cit.* note 14, pages 23-24; Gellhorn, *id.*, pages 7-8.

17. Landis, *op. cit.* note 14, page 98.

18. *Id.*, at pages 39-40.

19. Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 619 (1916).

20. Gellhorn, *op. cit.* note 15, pages 13-14.

21. The first report of the American Bar Association Special Committee on Administrative Law contained the charge.

> "The judicial branch of the federal government is being rapidly and seriously undermined . . . the decision of controversies of a judicial character must be brought back into the judicial system." 59 A.B.A. REP. 539, 549 (1934).

In 1936 the committee advocated an administrative court, citing as the first fundamental evil of the administrative process the combination of judicial with executive or legislative functions. 61 A.B.A.REP. 720 *et seq.* (1936). The report of the Task Force on Legal Services and Procedure to the Commission on Organization of the Executive Branch of the Government (the "Hoover Commission"), 1955, which actually presents a rather modest and exceptionally well thought-out program, abounds in references to the separation of powers doctrine and the evils of its violation.

22. In 1936 Justice Stone accurately predicted the failure of objections to the administrative process as a whole:

> "Addresses before bar associations twenty years ago, discussing the rise of new administrative agencies, are reminiscent of the distrust of equity displayed by the common law judges. . . . So far as these nostalgic yearnings for an era that has passed would encourage us to stay the tide of a needed reform, they are destined to share the fate of the obstacles which Coke and his colleagues sought to place in the way of the extension of the beneficent sway of equity." Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 16-17 (1936).

23. As quoted in Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 408 (1935).

24. See Cohen, AMERICAN THOUGHT (1954), pages 129-134.

> law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental they give direction to all law-making.[25]

Since making law is by definition an exercise of legislative power, it is logical to assert that what we call judicial powers are in many instances only adjudicatory techniques, which may as well be proper tools in the exercise of legislative powers as in the exercise of judicial ones. Furthermore, since the courts through judicial action actually make perhaps more law than legislatures, without complaint from the Bar, it appears to many persons that we are in poor position to clamor so strongly for complete abolition of the use of adjudicatory techniques by administrative agencies in the course of their congressionally delegated legislative duties.

Third, there is a widespread feeling that the judicial process has had its chance and muffed it, that the courts have failed, and would again fail, to meet the challenge posed by Theodore Roosevelt in the words immediately following those quoted above:

> The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy which was itself the product of primitive economic conditions.[26]

Even among those who do not view the judicial process as having failed, there is a feeling that the passive, impartial character of that process is unsuited to the accomplishment of the affirmative policies entrusted to many regulatory agencies in our complex modern existence.

Fourth, the sincerity of the separation of powers argument against administrative adjudication is open to doubt, since no advocate of the doctrine has proposed the transfer to the courts of the adjudicatory functions of the Veterans' Administration, the Social Security Board, or the Bureau of Old Age and Survivors' Insurance, three of the clearest cases of pure adjudication. Instead our attack has been aimed primarily at agencies administering programs which are themselves distasteful in limiting traditionally unrestricted rights of property and contract.

Fifth, our extreme position may be taken as a gratuitous insult to the legislative branch in its implications that only judges have any respect for the rights of the people. We have consistently ignored Holmes' reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts".[27]

Finally, there is a general recognition that, from a practical standpoint, many agencies have done well what they were established to do and a consequent feeling that success of the organized Bar's attack would have the effect of undoing much good in social and economic fields which has been laboriously accomplished over the past seventy-five years.

Some of these faults of the Bar's position are consciously understood by legislators and the people generally—others are only subconsciously felt. Many of them are applicable only to certain types of administrative agencies. But it is absolutely clear that the principle of complete divestiture of *all* adjudicatory powers of *all* administrative agencies is discredited beyond reasonable hope of revival. This discredit is merited, not only because the dogma is historically and logically unsound, but also because, from a coldly practical standpoint, "a government consisting of three [completely] separate powers would get no farther than a span of three horses without a driver".[28] Our strength comes from the interplay of the powers and the checks and balances among them—our unity from the ultimate responsibility of all branches of government to the electorate and to the court-sustained fundamentals of Christian morality.

The foregoing analysis does not imply that the judicial branch should abdicate any of its legitimate powers, nor that the Bar should cease to demand needed reforms throughout the administrative process as a whole. It does suggest that we have taken an indefensibly and unnecessarily extreme

Roy L. Cole

position,[29] and one which by virtue of its extremity may well have prevented the return of administrative adjudication to the courts in certain situations where such return would best promote the public interest.

III.

If the demand for total abolition of all administrative adjudication is, as I believe, untenable, the opposite extreme is likewise indefensible. To allow Congress to provide for administrative use of adjudicatory techniques as incidental aids in implementing certain definite economic regulatory programs is one thing—to permit administrative adjudication of matters affecting life, liberty and basic individual rights, even with judicial review, is quite another. It is also a threat to our system of checks and balances to allow establishment or continuation of administrative adjudication in areas where there is no affirmative legislative policy to be implemented wholly or partly by the use of adjudicatory techniques; and a similar threat exists in the indefinite continuation of administrative adjudication in agencies of any type which

25. Theodore Roosevelt, in message to Congress of December 8, 1908, quoted approvingly by Mr. Justice Cardozo in THE NATURE OF THE JUDICIAL PROCESS (1921), page 171.
26. Id., page 171.
27. *M.K.&T. Railway of Texas* v. *May*, 194 U.S. 267, 270, 48 L. ed. 971, 973 (1904).
28. Cohen, AMERICAN THOUGHT (1954), page 131.
29. We have perhaps taken such an extreme position because of unjustified lack of confidence in the judiciary's ability to maintain the rule of law in the administrative process as a whole through the establishment of safeguards in the process itself and through judicial review. See discussion in notes 47 and 48 with reference to the proper scope of procedural control and judicial review.

use these techniques to the substantial exclusion of others, and which therefore actually constitute extra-judicial courts. Our solution to the basic problem of administrative exercise of judicial powers lies somewhere in the middle ground, and can be best approached through separate analysis of each class of agency.

Administrative agencies may be classified in various ways, *e.g.*, according to form, function, operational organization or degree of independence. For our purposes the functional analysis seems most fruitful. We have the following types:[30]

(1) Claims or "benefit" agencies such as the Veterans' Administration, the Social Security Board and the Bureau of Old Age and Survivors' Insurance, which do not set policy, but merely handle great numbers of small claims on the basis of approving those covered by comprehensive statutes and disapproving those not covered.

(2) The Tax Court, formerly the Board of Tax Appeals, which adjudicates controversies under the tax laws between taxpayers and the Commissioner of Internal Revenue.

(3) Authorities such as the Attorney General's Immigration and Naturalization Service and the Third Assistant Postmaster General, regulating matters involving life, liberty and freedom of speech and communication.

(4) Agencies such as the ICC, SEC, FPC and FCC, which regulate and control nationwide industries in the public interest, and which bear a clear burden of responsibility for their actions and for the success or failure of their efforts. These agencies act primarily through rules and use adjudicatory techniques as supplements to the rule-making power. In this class also fall such departmental divisions as the Commodity Stabilization Service in the Department of Agriculture, with broad regulatory power over certain aspects of nation-wide industries, operating similarly to the independent agencies but having less easily identifiable responsibility.

(5) Agencies such as the FTC and NLRB, which are regulatory in intent but prosecutory in form, which cut across all industries and fields of endeavor, have no clear burden of responsibility for the results of their efforts, and use adjudicatory techniques as a primary means of establishing and enforcing policy.

A. The clearest case for retention of adjudicatory powers by administrative agencies is in the first category—the claims or benefit agencies. Paradoxically, these are the authorities which make greatest use of adjudication in performing their functions. But the "controversies" which they determine are not really adversary in nature. Certain benefits are granted by Congress to those meeting carefully prescribed statutory conditions. In the vast majority of cases the determination of whether an individual meets those conditions calls merely for mechanical application of the rules to the undisputed facts. There is no real opposition to a claimant—agency personnel are charged with assisting him to obtain benefits to the full extent he is lawfully entitled. There is no necessity for the trial and evidentiary rules of a court. And as a practical matter the judicial system would quite surely be literally overwhelmed by the application of judicial procedures to the millions of claims involved. Unless the broadly phrased demands for the removal of all judicial powers from all administrative agencies may be taken as such, there has never been any suggestion by a responsible group or individual of the Bar that the courts should take over the functions of these agencies.

B. The clearest case for removal of judicial powers from an administrative agency involves the Tax Court. As the name implies, it is a court, it operates as such, and should be transferred to the judicial branch. Its sole business is the adjudication of highly technical tax controversies between the government and individuals. In this process it deals with the ascertainment of facts of the type which judicial procedures are best fitted to ascertain, and with the interpretation of detailed statutory codes on a subject as to which lawyers are the experts. It has no regulatory, investigatory or policymaking authority,[31] is charged only with the fair and impartial adjudication of cases, and clearly belongs in the judicial system.

C. An equally clear and more urgent case for transfer of adjudicatory functions from administrators to courts is in our third category—authorities exercising control over matters involving life, liberty and freedom of speech and communication. The most important agency in this field is the Immigration and Naturalization Service of the Department of Justice.[32] A special inquiry officer first determines the question of exclusion or deportation. An appeal then lies to the non-statutory quasi-judicial Board of Immigration Appeals.[33] There is a further right of appeal to the courts in deportation cases[34] and possible review through habeas corpus in exclusion proceedings.[35] But in no case is full judicial review available, although we are here dealing with administrative power which can result, in Justice Brandeis' words, "in loss of both property and life; or of all that makes life worth living".[36] As pointed out by the Hoover Commission's Task Force on Legal Services and Procedure, the arbitrary exclusion of an alien not entitled to constitutional protection not only is inconsistent with humanitarian principles but also many times deeply affects citizens of the United States to whom the alien may be related.[37] The problem in this field is infinitely complicated by what the Hoover Commission Task Force has correctly termed the absolute essentiality to the national security that unauthorized persons be

(Continued on page 1003)

30. Authorities, such as the Civil Service Commission, which are concerned merely with the internal organization and day-to-day operation of the Government, while technically within the definition of administrative agencies, do not affect the problem at hand and are not here considered.

31. *Stern* v. *Commissioner*, 215 F. 2d 701, 707 (3d Cir. 1954).

32. Established as a division of the Department of Labor in 1933 (Exec. Ord. No. 6166, §14, June 10, 1933) by combination of previously separate bureaus. Transferred to the Department of Justice by Reorganization Plan No. V, effective June 14, 1940, 54 Stat. 1238. The long history of administration of immigration, naturalization and deportation laws is summarized in note following 5 U.S.C.A., §342.

33. 8 Code Fed. Regs. part 6 (1952).

34. Immigration and Nationality Act of June 27, 1952, 66 Stat. 166.

35. *Tom We Shung* v. *Brownell*, 346 U.S. 906, 98 L. ed. 405 (1953).

36. In *Ng Fung Ho* v. *White*, 259 U.S. 276, 66 L. ed. 938 (1922). Professor Gellhorn has noted the tremendous difference between the comparatively light economic sanctions imposed by even such highly controversial agencies as the NLRB, FTC and SEC and the personal sanctions of the Immigration and Naturalization Service. Gellhorn, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS, pages 27-38 (1956).

37. Report of the Task Force on Legal Services and Procedure to the Commission on Organization of the Executive Branch of the Government, page 270 (1955).

Highlights of the Los Angeles Meeting—

Largest in the History of the Association

It could have happened only in Los Angeles.

One of the stars of "I Love Lucy" appeared before a session of the erudite Section of Taxation; a dignified gathering of the Section of Judicial Administration was keynoted (and very ably) by the "Father" of "Father Knows Best" fame; almost everyone, from yearling lawyers attending their first Annual Meeting to grey, sedate veterans of the Bench, took a whole afternoon away from legal conferences and workshop sessions to romp with the children at Disneyland; and a well-known television and motion picture comedian made a witty and genial speaker at the traditional Annual Dinner, sitting at the speaker's table with Mme. Chiang Kai-Shek and a host of distinguished lawyers and judges.

And then there was a trained whale (that's right—a whale); a trip to the moon; California scenery (even more spectacular than the lunar landscapes); the Los Angeles freeways (for those who like real excitement); and . . . . Well, if you weren't there, that's too bad. There will probably never be another Annual Meeting of the American Bar Association like this one. Not for a long time anyway.

Of course, this *was* an Annual Meeting of the American Bar Association—the 81st—and so it was a working meeting. In spite of the fun and the California hospitality and the sunshine and the lavish entertainment, the lawyers who attended the meeting suddenly realized, as it neared its end, that they had done a lot of work in Los Angeles and had learned a great many things about the serious aspects of the profession. It just didn't seem like work in California.

Officially, the meeting did not begin until Monday morning, August 25, when President Charles S. Rhyne pounded his gavel in the Philharmonic Auditorium, but most of the eighteen Sections of the Association had already been meeting for several days before then, and the entertainment and sightseeing began as soon as the first of the more than 5,000 lawyers and their families arrived. As early as Saturday evening, there was a pops concert in the Hollywood Bowl with Carmen Dragon conducting; at least fourteen churches and synagogues threw open their doors with an especial welcome to American Bar Association members during the weekend; and on Sunday afternoon there was the President's Reception on the East Lawn of the Ambassador Hotel. Baseball enthusiasts had the opportunity of seeing the world's champion Milwaukee Braves in action against the Los Angeles Dodgers on Saturday, and on Sunday, Monday and Tuesday, the Dodgers played the Cincinnati Reds. Those who preferred to participate in sports had their choice of excellent golf courses, swimming in the Pacific, or fishing.

The opening session of the Assembly filled the Philharmonic Auditorium, and there were addresses of welcome by Governor Goodwin J. Knight, Mayor Norris Poulson, and President E. Avery Crary of the Los Angeles Bar Association. Joseph N. Welch, of Boston, himself well known to television audiences, responded for the Association, and the addresses of the day were delivered by President Rhyne and Chief Justice Earl Warren. At later meetings of the Assembly, the members of the Association heard addresses by Arthur Kelly, Q.C., President of The Canadian Bar Association, Attorney General William P. Rogers, Leslie E. Peppiatt, M.C., President of the Law Society of England, and Sir Harry Hylton-Foster, Q.C., M.P., Solicitor General of Great Britain.

The Assembly, composed of all members registered at the meeting, also conducted several business sessions, including favorable action on several proposed constitutional amendments (the most important of which created the office of President-Elect). The Assembly also took action on resolutions submitted by individual members.

The traditional climax of the Annual Meeting is the Annual Dinner, this year held in the International Ballroom in The Beverly-Hilton, where Bob Hope shared the program with Mme. Chiang Kai-Shek, who was the featured speaker of the evening—a particularly interesting speaker because of the tension in the Formosa Strait which was in the back of everyone's mind as they listened to China's first lady. At this dinner, the American Bar Association Medal, the highest honor within the power of the Association to bestow, was conferred upon former President E. Smythe Gambrell, of Atlanta, Georgia, for his services to the cause of the administration of justice.

The House of Delegates, the Association's policy-making body, held five sessions and debated many questions of Association policy. A detailed account of the proceedings of the House will appear in the November issue of the

JOURNAL.

In recent years, the meetings of the various Sections have become for many members main attractions at the Annual Meetings of the Association, and the eighteen Sections at Los Angeles presented programs that turned out to be some of the most interesting and stimulating events of the week. Here, there is "bread and butter" material for members who are interested in particular phases of the law or professional organization. At workshop sessions, panel discussions, lectures and debates, lawyers have an opportunity to discuss their own professional problems and learn new concepts that help them in their daily work. This year, the very titles of some of the subjects show how much there was to read, mark, learn and inwardly digest. There were traditional legal topics like "Probation, Parole and Pardon", "Liquidated Damages in Construction Contracts" and "Estate and Tax Planning" —to pick a few at random—and there were topics that were unthought-of at the last Annual Meeting held in Los Angeles in 1935—subjects such as "Technical vs. Human Factors in Space Travel", and "States' Rights and Atomic Energy". There was something from which every lawyer who attended could learn, whatever his interests or the nature of his practice, and lawyers could be heard in the halls of the hotels lamenting the fact that they could be in only one place at a time.

The Los Angeles Meeting was the largest in history, having a total registration of 5,604. If the families of members are counted, there were probably over 10,000 people in Los Angeles for the meeting. They were not disappointed. Even the weather (in spite of the predictions of a few cynics who probably came from San Francisco rather than Florida) was the kind that the California Chamber of Commerce has been boasting of for years—not once did we see the beautiful golden haze which Los Angeles' detractors call "smog".

E. Smythe Gambrell Receives the American Bar Association Medal

The highest honor within the gift of the American Bar Association was bestowed upon E. Smythe Gambrell, of Atlanta, Georgia, at the Annual Meeting in Los Angeles, when he was presented with the American Bar Association Medal. The Medal is awarded for "conspicuous service to the cause of jurisprudence".

First presented to Samuel Williston in 1929, the Medal has been awarded to twenty-three men, including Elihu Root, Oliver Wendell Holmes, John Henry Wigmore, Charles Evans Hughes, Arthur T. Vanderbilt and John J. Parker.

The citation accompanying the award to Mr. Gambrell read:

> In grateful recognition of his long and conspicuous service to the cause of American jurisprudence. To his many tasks magnificently executed, he has brought fine idealism, sound wisdom, great talents, a stout heart and boundless energy. As a successful and well rounded lawyer representing vital interests in the Western Hemisphere, as Professor of Law at Emory University, as President of the American Bar Association and the American Bar Foundation, and Chairman of The Fellows of the Amerian Bar Foundation, and in a legion of other posts of high professional and civic responsibility, he has been ever mindful of the lawyer's paramount obligation to society. Beyond his leadership in local and state bar activities, he has, for more than a third of a century, devoted himself unselfishly to the national bar program and to the strengthening of the legal profession. His record for unremitting attention to the work of the American Bar Association and unbroken attendance at its meetings stands preeminent. As Chairman of the Conference of Bar Association Delegates, he was one of the authors of the democratic and representative reorganization of the Association in 1935-1936; under his leadership in 1955-1956, the Association experienced its greatest growth, and its position as the authoritative spokesman of the legal profession was made clear. Completely dedicated to the Association, he underwent unprecedented exertions to carry in person its message to virtually every State and Territory. An unwavering exponent of the dignity of man and the freedom of the individual, the eloquent voice of E. Smythe Gambrell has been heard at Runnymede and throughout the Free World, and even behind the Iron Curtain, teaching that each man is a creature of divine will, worthy in his own right.

The Medal was presented at the Annual Dinner on Thursday, August 28, during the climax of the Annual Meeting. In accepting the Medal, Mr. Gambrell said:

> I am overwhelmed by this honor, and am keenly conscious, Mr. President, that only in a representative capacity can I accept it. It is clear that this award is intended as a recognition of the labors and achievements of the

thousands of great spirits with whom it has been my good fortune to be associated in this organization for thirty-three years.

How thrilling, how rewarding it is to live and work as lawyers in times like these! In whatever state, and, whether in the cities or the hamlets and villages of our beloved country, we serve as one great priesthood the common cause of justice. Ours is the happy privilege of calling men every where to worship at the shrine of liberty under law.

Mr. President, the generous citation you have just read sounds very much like an obituary, but I must tell you I am not ready to make my final apologia here tonight. One cannot quit when more than 100,000 American lawyers still are outside this Association; when more than one third of the people of the entire world still languish in spiritual, mental, economic and political bondage. This occasion and this great convention again have made plain to us the breadth of our opportunity and the urgency of our duty.

My dear friends, I shall treasure this Medal as a reminder of the happy days and years we have worked together in the American Bar Association. I am profoundly grateful.

E. Smythe Gambrell

The Medal is of twenty-four carat gold, three inches in diameter. On the obverse is the St. Memin profile of John Marshall with the inscription, from the Massachusetts Constitution, "To the end it may be a government of laws and not of men". The reverse shows a seated figure representing Justice with the single Latin word "Justitia". The Board of Governors of the Association decides who is to receive the Medal, and the name of the recipient is always a closely guarded secret until the moment the Medal is presented at the Annual Dinner.

Former Recipients of the American Bar Association Medal

1929	Samuel Williston	Cambridge, Mass.
1930	Elihu Root	New York, N. Y.
1931	Oliver W. Holmes	Boston, Mass.
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EDITORIAL OFFICES

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Twelve Good Men and Women

Observing that the "widespread resistance to jury duty delays the courts and is bringing the system under attack", a recent magazine article says (*National Review*, September 13, 1958):

> As a result of this indifference and interference, the right to trial by jury is coming under sharp attack. Professor Charles Newman of Florida State University, in a *Law Journal* article, has called it "an outmoded relic of the thirteenth century and not appropriate for the present day administration of justice."
>
> If some jurists have their way, trial by jury will be abolished in civil cases. They have already asked for it on an experimental basis. Your guilt or innocence, then, will be decided by a single judge.
>
> This would be unfortunate if only because a Gallup Poll taken at the end of 1957 revealed that Americans would prefer—by a three to one margin—to be tried by jury if suddenly confronted with a civil action or accused of a minor crime.

Many critical *words* about juries—all too common these days as against *action* to make them function ever better—come from persons who have never been in legal trouble, who have never sat on juries civil or criminal, and who are here and there disappointed by jury results, just as some persons are disappointed each year by judges' results.

By way of contrast, the warm personal testimonial in favor of jury service in this issue by one of our distinguished citizens, Mr. Clarence K. Streit, who, too, was reluctant to serve, is most illuminating and reassuring:

> Sitting through a trial as a member of the jury and then seeking with the other eleven jurors to reach a just *and* unanimous verdict is a very enlightening and enriching experience.

Every word of his tribute is comforting, since it is unlikely that the right to a jury in civil and criminal cases in this country will be done away with in foreseeable time, except in so far as the parties themselves voluntarily dispense with juries in civil cases. The latter is being done more and more in England and Canada, where the screening processes for the selection of an independent judiciary are said to be not only strict but non-political. Indeed, one Lord Chancellor is reported to have said not so long ago that, for reasons of merit, he had been unable for a number of years to recommend to the Crown appointment of a judge from his own political party.

Born centuries ago from opposition to the exercise of despotic and arbitrary power by king's judges—"judges dependent on his will alone", in the words of the Declaration of Independence—the jury continues to represent in the minds of most of our citizens confidence in the verdicts of one's peers as represented in a multi-person jury made up of a cross-section of the community, rather than to let the facts be found finally by a single trial judge.

Obviously the process of selecting a jury (sometimes long, but now being improved in many places) and the need of applying strict rules of evidence to a jury that are not applicable in a trial before a judge strikes some persons, in the press of modern life, as inefficient. But one can perhaps quote as relevant the words of Mr. Justice Brandeis in another context (*Myers* v. *United States*, 272 U.S. 52, 293):

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.

One need not seriously go along with Mr. Streit—obviously making a deliberate overstatement to impress on lawyers the great importance of really studying jury service on the merits—in holding that no one should "be admitted to the Bar, or made a judge, or permitted to teach law, who has never served as a juror". This would subject admission to the Bar, the Bench and law school faculties to the essential but unpredictable vagaries of jury selection processes. Many persons with legal ambitions, even though willing, would never be selected to serve on juries, especially those of merely law school age. Moreover, one might equally say that one should never do anything unless one has already done something comparable before. However, accepting Mr. Streit's postulate as for emphasis only, one can ap-

propriately agree that lawyers, judges and law school teachers can learn much about juries, their functioning and their essential value by carefully studying such testimonials as that of Mr. Streit.

There is no doubt that avoidance of jury duty by those who should serve is a potent evil; but correction is largely in the control of the courts and in some instances in the control of legislatures whose predecessors years ago created exemptions that cannot now be readily justified. For example, the exemption of women, or lawyers or doctors, and numerous other classifications, at their own option, can no longer be convincingly defended. In many places the evil of avoiding jury duty is being corrected by judges who allow few excuses, and by employers, corporate and individual, who are recognizing more and more that jury service is a civic duty, just like voting and military service, in which they have a great stake, and should be encouraged rather than deprecated and deplored.

On the premise that the foregoing observations are worthy of consideration, it seems fitting to quote the closing words of the magazine article first quoted from above:

> To the average American it is always a consoling thought that if ever in legal trouble, he is entitled to the historic right of trial by jury. His willingness to serve as a juror for his fellow citizen, when called, will help keep that system of justice functioning. It is a sacrifice, certainly, but as it has been said, next to military service it is the noblest duty of citizenship he can perform.

Greetings from the President

The following telegram from the President of the United States was sent to Association President Charles S. Rhyne and read at the Annual Dinner in Los Angeles on August 28:

I am delighted to send greetings and congratulations as the 81st Annual Meeting of the American Bar Association draws to a close.

The theme of this year's meeting, "Leadership of Lawyers in Public Affairs", is of particular significance in this era of rapid community growth and broadened requirements for leadership. The clear challenge confronting you can and must be met by lawyers not only on a national level but in villages, towns and cities throughout the country.

Tonight I should like to make special note of a significant project of the American Bar Association of the past year. That activity was its part in making the first observance of Law Day, U.S.A., such a success. Law Day, U.S.A. stressed the role of the rule of law in our land and its observance had an important impact on the nation:

First, it helped re-emphasize in the public mind that reverence for the law so vital to a free people.

Second, it fostered respect for our system of government under law.

Finally, Law Day served to remind our citizens of the crucial role of law in world affairs and the hope it offers for peaceful settlement of disputes among nations.

I am grateful to the American Bar Association for the co-operation and professional guidance it has given this Administration during the past year in the selection of federal judges and for assistance to the Administration's legislative program concerning the administration of justice.

To each of you personally and to your distinguished organization, my very best wishes for a successful year ahead.

DWIGHT D. EISENHOWER

Judicial Administration:

California Adopts the Pretrial Conference

by Benjamin E. King, Jr. • *Deputy Attorney General of the State of California*

The pretrial conference, which has been hailed as a great step toward speedier justice, has been adopted in California, and the plan is being tested in the courts of that state. Mr. King tells of the workings of California's pretrial procedure during the initial phase of its existence.

California, its trial courts burdened by topheavy caseloads, linked itself with the prevailing American trend in January, 1957, when it inaugurated one of its most significant judicial reforms in recent years—the mandatory pretrial procedure.

The aim: to slacken the insufferable pressure on crowded trial calendars throughout the state. More than six million causes were initiated in California's municipal and superior tribunals in fiscal 1956-1957. About 5,800,000 were disposed of. Justice courts absorbed some one million additional filings. Given these figures and a little coaxing, a mechanical brain might conclude that practically every California resident became involved in some manner of litigation during this period.

About thirty-one states now sanction pretrial in one form or another, and others avail themselves of it on a voluntary or experimental basis; many federal district courts also employ it. Michigan recently became the third state, in addition to New Jersey and California, to provide for mandatory pretrial on a statewide basis. Only Alabama, Indiana, Maine, Mississippi, Montana, Oregon, South Carolina and Tennessee are said to extend it little or no recognition.[1]

The Judicial Council of California, headed by Chief Justice Phil S. Gibson (and apparently acting under the Herbertian supposition that too many lawsuits, inexpeditiously handled, consume time, money, rest and friends[2]), adopted the new procedure in September, 1956. Compressed into seventeen succinct rules, it is now laboring through its second year of hard-and-fast application.

The initial returns already indicate a measure of pretrial success. According to the Los Angeles county clerk's office:

Since the institution of the device, settlements in metropolitan Los Angeles have increased roughly 18 per cent. From March, 1957, the first month in which matters actually reached the pretrial stage, through July of this year, a total of 7,730 cases went off-calendar, as opposed to 6,540 during the same part of 1956-1957;

The courts have processed a larger number of cases. However, the "inflationary spiral" of pending matters has still not been checked, so that although there have been more settlements, there also have been more filings;

There also is evidence that the time required to conduct both jury and nonjury trials has been reduced.

Whether these trends are a true barometer and are, directly or indirectly, attributable to pretrial is still in doubt.

But this much is certain: the results are being watched with keen anticipation by both Bench and Bar—especially since mandatory pretrial has been followed by a liberalized set of discovery rules. Thus, will the newly effected policy lose in pretrial time what it saves at trial? Will it force law firms to staff more young attorneys, as the young attorneys hope? Will it actively promote settlements, or merely force the judicial machinery to sag even more because of the extra steps—the pretrial conference—involved. In brief, will it work effectively, or work at all? The ensuing year should yield conclusive answers.

Some attorneys are, of course, maintaining a professional, mule-like skepticism towards mandatory pretrial. Others envision it as a mild panacea. Certainly if it can appreciably relieve

1. See Kincaid, A JUDGE'S HANDBOOK OF PRE-TRIAL PROCEDURE, reprinted from 17 F.R.D. 437, 440.
2. Purloined from George Herbert (1593-1633).

the clogged-calendar quandary, the courts will have found some potent artillery in one of the toughest fights they face today.

The basic problem is as old as the English wig. Diogenes likened laws to cobwebs,[3] and Hamlet, even in one of his more deranged moments, took time to count the law's delays among life's "whips and scorns".[4] Lincoln, too, recognized the difficulty; persuade your neighbors to compromise whenever you can, said he. Simply stated: delayed justice begets injustice.

Clarence L. Kincaid,[5] Judge of the Los Angeles County Superior Court and chairman of the Pretrial Committee, Section of Judicial Administration, American Bar Association, has framed the issue this way:

> Most criticism of the courts and of the legal profession stems from the delays and high costs incidental to litigation, as well as the ponderousness of our legal procedures. . . .
>
> We can only continue to merit the confidence of the public if we demonstrate a willingness to meet these issues.[6]

Pretrial . . .
No New Concept

The pretrial concept is not totally new, of course—not even in the modern code state of California. which often has been in the forefront of judicial reform. Twenty years ago it was given a rather perfunctory test-run here and found wanting.[7] But other jurisdictions tried it and liked it. The first systematic use of pretrial in the United States is, in fact, believed to date back to 1929, when Chief Judge Ira W. Jayne of the Circuit Court, Third Judicial District of Michigan, began to hold such conferences, not because of legislative compulsion but as an exercise of the inherent power of the court.[8]

Its success in pace-setting New Jersey has commanded widespread attention. Within three years, the number of matters pending there shrank from 9,445 to a more respectable 4,882.[9] After the sixth year, Chief Justice Arthur T. Vanderbilt was able to announce that the state's trial calendars were substantially current.[10]

No wonder California is willing to take another look.

Basically, the pretrial system may be said to possess three distinct advantages:

(a) Speedier proceedings (prior to trial, factual and legal issues are crystallized, pleadings amended, uncontested matters disposed of, the number of expert witnesses fixed, discovery proceedings and physical examinations concluded, the question of a jury determined, cases consolidated, etc.);

(b) More settlements (a valuable albeit supposedly incidental attribute of the system[11]); and,

(c) Increased public confidence.

Here, briefly, is how pretrial operates in the Golden State.

Unlike its older brother in New Jersey, California's compulsory procedure is required in all civil cases at issue in which memoranda to set for trial are filed. There are two exceptions: short causes, meaning those in which the estimated trial time is two hours or less, and certain trials on appeal from justice or small claims courts, these being so-called inferior forums which primarily handle tort and contract claims involving $500 or less.[12] By contrast, actions for divorce or to nullify a marriage, and certain summary proceedings, are exempt from the imperative effects of pretrial in New Jersey.[13] Both jurisdictions invoke pretrial conferences after new trials are granted, California specifically allowing such matters to enjoy priority.[14]

When the aforementioned memorandum to set is filed, the court clerk places the time and location of the pretrial conference on the Civil Active List, and gives a minimum of fourteen days' notice by mail to all parties.[15] The notice sets forth with particularity what is expected of counsel. If an attorney is involved in several conferences, all will be assigned for the same date, insofar as possible.[16]

Under the judicial system as formerly operated, opposing attorneys often did not see one another, and never conferred, until they reached the squared-circle of the courtroom. Now they must confer at least *twice* before trial. First, they or the litigants are required to "reach agreement upon as many matters as possible" *prior* to the pretrial conference.[17] If the opposing attorneys practice in the same geographical area, this often means a face-to-face meeting (preferably sans pistols). However, a conference by correspondence is permitted. Thereafter, they must jointly prepare for submission to the pretrial judge, a written statement of the matters agreed upon, and a joint or separate written statement of the factual and legal contentions as to issues remaining in dispute.[18] By this it is hoped that routine, non-contested issues will be disposed of in advance.

Let's say that a truck driver is sued for damages arising out of an automobile accident; joined as a co-defendant, under the doctrine of *respondeat superior*, is the employer-corporation. As a matter of course (and purely in the interest of legal shadow-boxing), the employer may deny ownership of the vehicle, or that the driver is an employee, or that the truck was operated within the scope of his employment. Such tribulations may be effectively handled at the so-called pre-pretrial level. Likewise, in a condemnation proceeding, the jurisdictional issues of public use and necessity may be stipulated to, leaving only the fact question of fair market value for determination at the trial. *Ad infinitum.*

The rules also provide that each party, or counsel, shall complete his depositions, interrogatories, physical examinations, exchange of written reports of examining physicians, and re-

3. Quoting Solon, from LIVES AND OPINIONS OF EMINENT PHILOSOPHERS.
4. Act III, Sc. I.
5. Often called the father of modern California pretrial (see Nelson, *Pre-Trial—An Effective Weapon of Advocacy*, 4 U.C.L.A. L. REV. 381, 395 (1957)).
6. 17 F.R.D., *supra* at 439-440.
7. See Kincaid, *Pre-Trial Conference Procedure in California*, 4 U.C.L.A. L. REV. 377, 378 (1957).
8. Nims, PRE-TRIAL, 3-4 (1950).
9. Karcher, *New Jersey Streamlines Her Courts: A Revival of "Jersey Justice"*, 40 A.B.A.J. 759, 761 (1954).
10. 17 F.R.D., *supra* at 441.
11. See Kincaid, *Pre-Trial Conference Procedure in California*, 4 U.C.L.A. L. REV., *supra* at 380.
12. Judicial Council of California, *Rules for the Superior Courts* (1956), effective January 1, 1957, as therein provided. Rules 8, 9, 9.5.
13. Supreme Court of New Jersey, *Rules Governing the New Jersey Courts*, Rules 4:29-1, 4:85.
14. California Rule 8.11; New Jersey Rule 4:29-7.
15. California Rule 8.1(b).
16. *Id.*, Rule 8.1(a).
17. *Id.*, Rule 8.2(b).
18. *Id.*, Rule 8.2(c).

quests for admission or genuineness of written documents or of the truth of relevant matters of fact, before the pretrial conference. Failure to do so may constitute a waiver.[19] On the other hand, if good cause is shown, it appears that a judge may grant permission to undertake tardy discovery proceedings.[20]

At the Conference . . . Matters To Be Considered

Finally, the pretrial date arrives. Here are some of the matters which may be properly considered and acted upon at this conference:

The written stipulation of the opposing parties; simplification of factual and legal issues; amendment of pleading; admissions, both of facts and documents, to avoid unnecessary proof; propriety of referring matter to a referee or commissioner; whether the court has jurisdiction; identifying parties to the cause; advisability of requiring a trial brief or memorandum; re-estimation of jury time; whether a law or motion matter is pending; whether any party remains who has not been served with process or otherwise made an appearance; clarification of damage claims; assignment of trial date; and, determination, upon stipulation, of "any other matter which will aid in the disposition of the case".[21]

The rules handle the touchy question of settlements with due caution. The judge may "inquire" into the possibility of settlement, but the pretrial order may not contain any reference to it.[22] Similarly, no party is compelled to submit to an adjudication of controverted facts.[23]

It should be noted that the revelations of pretrial may serve as a springboard for a motion for summary judgment. In California, such a motion is available if it is claimed that there is no defense to the action or that it lacks merit. If successful, a final judgment may be entered forthwith.[24]

The pretrial conference itself occurs in the open courtroom or in chambers, as the judge desires.[25] (New Jersey demands that all such sessions be held in open court).[26] The guiding light, the helmsman and sometime straw-boss, of the conference is of course the pretrial judge. Upon his acumen and equanimity rests the ultimate success of the proceedings. He must nurse the case along without subverting its merits; he must be firm without being dictatorial or unduly persuasive; he must patiently draw out the issues, separate the vital from the inconsequential, and, most important, create an atmosphere conducive to free and open discussion. California does not demand that the pretrial judge sit at the trial of the case.

Of special significance is the requirement that parties attending the conference must possess a "thorough knowledge of the case" and be prepared "to make stipulations or admissions where appropriate".[27] The imperative wording is all too clear. To some, it augurs the end (if ever it existed) of the glamorous age of the prima donna, that Hollywoodian advocate who depends more on windy eloquence than legal argument and who, with one decisive flash of genius, figures out a crushing *coup de grâce* when all appears lost.

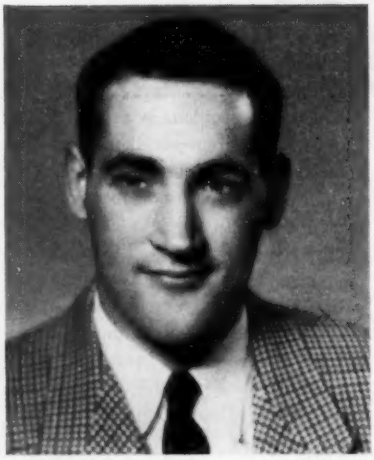
Recently, a Superior Court judge fined a Los Angeles firm $100 for failure to be properly represented at the pretrial conference. While the District Court of Appeal reversed, holding that the firm could not be fined, it also indicated that the individual attorney could be penalized in an appropriate case.[28] It thus appears that counsel will not be able to ignore his obligations with impunity.

The judge has authority to continue the conference from time to time.[29] However, no part of the conference, other than the pretrial order, may be referred to at the trial itself.[30]

Preferably in the presence of the attorneys and no longer than five days after the conference, the judge prepares and signs the order.[31] This consolidates the achievements of the conference and is the yardstick by which its success is measured. Reviewable on an appeal from a final judgment,[32] the order contains, *inter alia*, a concise statement of every rule and order of the judge at the conference, the matters agreed upon or admitted, and the factual and legal contentions advanced by each party.[33] It becomes a part of the record of the case and where inconsistent with the pleadings, controls the subsequent course of the action unless modified at or before the trial.[34] The clerk serves the order upon the attorneys, who are given five days to request a correction or modification.[35]

The trial date is set approximately five weeks after the conference,[36] the parties often waiving notice of trial. The clerk is instructed to continue to give priority in setting to those cases, *i. e.*, involving condemnation, forcible entry and detainer, injunctions, declaratory relief, etc., so entitled by law.[37]

Criticisms have been registered that pretrial is "just another time-burner" and also that it is not beneficial in automobile negligence actions. The positive results achieved in New Jersey belie the former point; in its first year under pretrial, the Law Division of the Superior and County Courts there



Benjamin E. King, Jr., is serving as a Deputy Attorney General of the State of California. He is a graduate of the University of California at Los Angeles.

19. *Ibid.*
20. *Id.*, Rule 8.2(d).
21. *Id.*, Rules 8.3(f), 8.4.
22. *Id.*, Rules 8.5, 8.6(b).
23. *Id.*, Rule 8.4(a).
24. Cal. Code Civ. Proc., Sec. 437(c) (West 1955).
25. California Rule 8.3(a).
26. New Jersey Rules 1:28-6 and 4:29-5.
27. California Rule 8.2(a).
28. *Cantillon v. Superior Court*, 150 Calif. App. 2d 184.
29. California Rule 8.3(c).
30. *Id.*, Rule 8.3(d).
31. *Id.*, Rule 8.6(a).
32. *Id.*, Rule 8.10.
33. *Id.*, Rule 8.6(a).
34. *Id.*, Rule 8.8.
35. *Id.*, Rule 8.7.
36. See *Id.*, Rule 8.12(a).
37. *Ibid.*

handled 3,741 cases, as compared to 2,442 under the old system.[38]

As concerns negligence matters, Supreme Court Justice Brennan has emphasized that it is precisely in this highly litigious field that New Jersey has realized "by far the greatest benefits from the procedure".[39]

An indication of how the procedure rates with the Judicial Council is seen in the fact that the changes made in the original rules during this initial period have been relatively few and insubstantial.

How about California? The author has spoken with many judges and attorneys about the matter. Generally, it may be said there is a greater necessity for the new procedure in large, impersonal communities such as Los Angeles and San Francisco than in smaller counties where relations between opposing counsel always have been closer, thus providing a ready-made basis for negotiations and exchange of information. A considerable body of practicing lawyers, and not a few judges, are, with some cynicism, prone to dismiss it as another source of paperwork and expense. On the other hand, "pretried" cases are better prepared, hence are more efficiently handled.

Surveying this early phase of pretrial in California, Judge Kincaid, in a recent article,[40] concluded that whenever judges have given the right kind of leadership the Bar has generally cooperated. Conversely, in a few areas judges have either been unsympathetic with the procedure, or have failed to understand their responsibilities. He noted that San Francisco had found the results gratifying. Example: the waiting time for jury trials there has dropped from twenty-one to thirteen-and-a-half months.

But the pattern is not consistent. While San Francisco courts have reported more and earlier personal injury case settlements, another county (Alameda) has found this field of litigation is being benefitted the least.

Judge Kincaid states that while most attorneys in Los Angeles County are giving the court their fullest assistance, a small segment of the negligence Bar still seem reticent. They send juniors with little authority to the pretrial conference, still following the old game of "hold out and wait for the breaks" until the trial date. They apparently resent any procedural methods whereby they are required to disclose facts relevant to their case, still relying on ambush and surprise.

The degree of success enjoyed by California may well determine how many of the remaining holdout states also go the pretrial way.

38. Nims, PRE-TRIAL 36-37 (1950).
39. Brennan, *After Eight Years: New Jersey Judicial Reform*, 43 A.B.A.J. 499, 564 (1957).
40. LOS ANGELES BAR BULLETIN, September, 1958.

The Department of Legal Medicine, Medical College of Virginia, and the Virginia State Bar announce that their two-day Medical Seminar for Lawyers dealing with personal injury problems resulting from trauma, particularly from automobile accidents, will be conducted on October 17 and 18, 1958, at the Medical College of Virginia, Richmond. The seminar will be limited to 100 attorneys. The program is designed to increase the proficiency of lawyers handling litigation in which medical testimony is involved. The first day will be devoted to the basic principles of medicine and on the second day the common injuries which most frequently appear in litigation will be discussed. A staff of over twenty-five physicians representing all the medical disciplines will conduct the course. For further information, write to Thomas D. Jordan, Medical Seminar for Lawyers, P. O. Box 41, MCV Station, Medical College of Virginia, Richmond 19, Virginia.

Books for Lawyers

THE EVOLUTION OF THE JUDICIAL PROCESS. *By James C. McRuer. The W. M. Martin Lectures. Ontario, Canada: Clarke, Irwin & Company Limited. 1957. $3.00. Pages 115.*

This book is an expansion and revision of the first of the W. M. Martin Lectures, delivered by the author, Chief Justice of the High Court of Justice for Ontario, at Saskatchewan University. It is intended not as a "detailed catalogue or comprehensive history of the evolution of the judicial process" but offered rather in the hope that "a glimpse of history, followed by another glimpse of contemporary systems in some of the dominant countries of the world, and some discussion of the judicial determination of international disputes, inquiring minds would be stimulated to make an objective appraisal and further study of the judicial process as it regulates the domestic affairs of free men, and as a probable organ for the regulation of all free men in their international affairs".

In attempting to deal with his subject comprehensively, the Chief Justice assigned himself an enormous task, but the result is a happy one.

Tracing the development of the judicial process in English law, he succeeds in touching upon nearly all the important and significant milestones in ancient and contemporary developmental history and has done so in a manner which is both informative and interesting.

Beginning with a discussion of the concept of justice and observing briefly some of the historical conceptions of justice described variously as natural law, natural justice, God's laws or moral law, he makes the pointed observation that "If we leave out of justice the quality of pertaining to the soul it necessarily loses its eternal quality and becomes something of a mechanical process that, instead of giving inspiration to men in their relations with one another, adjusts itself to the passing social customs and the predominant overpowering demand of a means to accomplish an end. It is true that what appears to be just today may not appear to be just tomorrow, because the men of tomorrow will have expanded their ideas of the true meaning of justice as a spiritual concept."

Throughout the book the Chief Justice makes remarkable observations and analyses which, through historical discussion, gradually unfold a graphic word picture of the judicial process as it developed. In referring to the Statute of 1819 abolishing trial by battle as the aftermath of the decision in *Ashford* v. *Thornton* (1 Barnewall and Alderson, 405), he points out that that statute "marked the surrender of superstition in the administration of justice to a judicial process which was due to the growth of a conception of justice founded on moral and spiritual principles which had their roots in Babylon, Israel and Rome. The orderly process of the human power to reason had overcome superstition."

The Chief Justice, in approaching the contemporary field, discusses those dominant countries wherein the judicial process exists as an outgrowth of the older systems with basic similarities, but also certain basic differences. He points out how Communist China retains forms of a judicial process for which "Precedents grown hoary with age over the centuries, or even millenniums, may be found . . ." but which modern civilization has discarded. He states that his purpose for including the contemporary judicial process was "to stimulate interest in inquiring minds and give incentive for further study"; to "provide a background against which to appraise objectively the strengths and weaknesses of our own system"; and as an introduction, and no doubt aid to understanding, to the subject of the development of the international judicial process.

Perhaps, the most important aspect of his work is his discussion of the international judicial process which contains far more than a mere historical study of its development. After laying the foundation for the international judicial process in history by showing its gradual development and the more frequent tendency or willingness of nations to submit national and international problems to international study, arbitration and decision, the Chief Justice points out with awful reality that as nations are now faced with the prospect of destruction and horror more terrible than at any other time in history, and "With a realization of how far political leaders have descended into the fiery pit of self-destruction, we search for some indications that the same forces that brought order in our domestic lives will bring order in the relationships between nations, be they great or small, powerful or weak."

In his conclusion he tells us "The scientist in his laboratory has created a world crying out for statesmen and lawyers with such qualities of leadership as the world has not known" prepared to "bring to a reality the visions of those who have dreamed of a temple where the spirit of international justice will be enshrined, before whose altar all men will worship and at whose gates the weak and the oppressed may find justice dispensed by those who 'do justly, love mercy and walk humbly' before their God."

This book is a most worthwhile contribution to the field of judicial development and should be commended to every library.

ORIE L. PHILLIPS

Denver, Colorado

USURPERS—FOES OF FREE MAN. *By Hamilton A. Long. New York: New York Post Printing Co., Inc. 1957. $1.00. Pages 115.*

Washington said in his Farewell Address:

If in the opinion of the People, the

distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates.—But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. —The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use itself can at any time yield.

Jefferson wrote in 1823:

> ...there is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court.

These classical texts may be said to form the take-off points of this brochure by Mr. Hamilton Long, a member of the Bar of the State of New York. This profound constitutional study is not only intriguing and thought-provoking, but is supported by documented evidence which makes the conclusions of the author irrefutable. The brochure is extremely timely, in that it points out the evils of the day which are transforming the Federal Government into a government of men instead of a government of laws; into a centralized government of unlimited powers instead of a decentralized government with definite limited powers which the provisions of the Federal Constitution clearly indicated the framers intended it to be, and which the members of state conventions ratifying it and the people whom they represented understood it to be. Mr. Long has presented a challenge to every American citizen who believes in a republican form of government under the Constitution and who desires to preserve our American way of life: Man-over-State.

He shows beyond all reasonable doubt that the framers of the Federal Constitution intended the central government to be vested with limited powers—a concept never before adopted by any other people in the history of civilization as their governmental philosophy. His main thesis as to their intent is as follows: The fundamental principles upon which this philosophy was conceived was that man was endowed with "unalienable rights", God-given rights at birth and "that man creates government as his tools in order to secure these rights"; that all governments derive their just powers from the consent of the governed, the people; that to preserve these rights the powers of government must be circumscribed with definite limitations and that public officials must always be subservient to the will of the people; that the creature should never become the master of the creator. These convictions were deeply seated in the minds of the framers of the Federal Constitution as the result of their comprehensive knowledge of the history of governments in the past and of their own experiences with the tyranny of British rule under the colonial regime in America and oppressive measures adopted by legislatures in some of the states after 1776 during the existence of the confederation of states.

From this breadth of knowledge and wealth of experience they were thoroughly convinced, he says, that the safety and liberties of the people under the government they were forming could only be preserved by providing in the organic law itself for adequate curbs and safeguards against the abuse of power by those entrusted with its administration; that jealousy rather than confidence must be the polar star in forming this new government; that there must be both a limitation of its duties and a limitation of power to be exercised in performance of those duties.

These questions, the author asserts, were thoroughly explored at that time and it was the fear of the people that the Constitution as originally adopted did not fully protect them from an unwarranted restraint of their individual liberties by the Federal Government.

The co-ordinate branches of the Federal Government were designed to serve as checks and balances against each other and the rights reserved to the states and to the people were to serve as a safeguard against the encroachment of the central government upon "individual liberties" of the citizens of the various states. It was not enough, in the opinion of the people as expressed by their representatives thereafter, to create checks and balances between the co-ordinate branches of the Federal Government but if the goal uppermost in their minds, *i.e.*, to keep the government, created by them, decentralized in the future it must be realized, if at all, by expressly reserving to the states and to the people all powers of sovereignty not expressly or by necessary implication granted to the central government under the provisions of the organic law. The first ten amendments to the Constitution adopted soon after its ratification were designed to achieve that result.

The author declares, in substance, that so long as the Supreme Court of the United States adhered to the cardinal rules of interpretation of the Constitution and of statutory enactments a proper balance was maintained between the executive, legislative and judicial branches of the Federal Government and between the states and the central government, thus safeguarding the individual liberties of the citizens of the respective states of the Union. But when the Court no longer looks to the intent and purposes of the framers and adopters of the Constitution to determine its meaning, as it ceased to do in 1937, it aided usurpation of the powers reserved to the states as a check against centralization of power in the Federal Government which constituted the principal mechanism of the Constitution upon which the framers of that document relied to preserve to the people a definite limitation upon the powers of the central government.

One certainly does not have to be either a statesman, a lawyer, a judge or an intellectual to observe and to realize that by the decisions of the Supreme Court since 1937 the powers of the Federal Government have been declared to be broadened to encompass fields of activity previously disclaimed and repudiated by the courts and by all the leading statesmen and students of government for 150 years and consequently have left only a skeleton of the rights reserved to the people and to the states. Mr. Long, in his brochure, has made this clear to the American people. This is positive evidence to all of us of the processes of national decay and the end of individual liberties in the United States.

The author in his review of the con-

stitutional cases of the Court prior to 1937, upon which the majority of the Court relied as supporting the policy of what he terms "reverse interpretation", leads him to the opposite conclusion reached by the Court. In no instance, he declares, prior to 1937, did the Court expressly, deliberately and voluntarily reverse a long line of consistent decisions involving the meaning of the Constitution as intended by the framers and adopters of that document. He states that in a few cases in which a prior decision was overruled, the Court was in effect choosing, of necessity, between what had come to be conflicting lines of decisions. In so doing it adopted one line of cases and overruled the other because of the need of clarification. This action of the Court, he asserts, gave no support to its 1937 "reverse interpretation" policy.

The author claims that the single proceeding entitled the *Legal Tender Cases* (*Knox* v. *Lee* and *Parker* v. *Davis*, 79 U.S. (12 Wallace) 457 (1871) decided together overruling *Hepburn* v. *Griswold*, 75 U.S. (8 Wallace) 603), decided in 1870, really constituted the only case which lends any support whatever to the "reverse interpretation" policy of the Court commenced in 1937. He points out that Mr. Justice Strong, who wrote the opinion for the majority of the *Legal Tender Cases*, explained at length that the *Hepburn* case was decided by a less number of judges than the law provided; that it was a 5-to-3 decision (due to a vacancy) and that the Court had not been accustomed to hearing a constitutional question in the absence of the full Court if it could be avoided. Mr. Justice Strong further stated that almost immediately after the *Hepburn* decision was handed down, the question of reconsidering it was discussed.

A reading of the opinion in the *Legal Tender Cases* should convince the reader that the Court felt reluctant to overrule the *Hepburn* case, as Mr. Long contends. It is also significant to note that in overruling the *Hepburn* case not a single member of the Court receded from his position in that case. The five-to-four opinion in the *Legal Tender Cases* was made possible by the resignation of one of the justices who held with the majority in the *Hepburn* case while his replacement and the newly appointed ninth member of the Court joined with the minority in the *Hepburn* case, thus constituting the majority in the *Legal Tender Cases*. Mr. Long reminds his readers that Charles Evans Hughes, in his book entitled *The Supreme Court of the United States*, published in 1928 before his reappointment to that Court as Chief Justice, criticized the legal tender cases overruling the *Hepburn* case the previous year, saying that it was destructive of the confidence of the people in the Court.

Mr. Long says the Court's present policy of reinterpreting the Constitution according to the will or whim of its members, in defiance of the consistent decisions of the Court for a century and a half based upon the intent of those who framed and ratified it, has already made a hollow shell of that document, to be changed again and again at will by the momentary majority of the members of the Court; that this policy has not only sanctioned usurpation of the reserved powers of the people and the states by the other two branches of the Federal Government, but the Court itself has become the prime usurper of those powers which he says has resulted in unconstitutional centralization of massive power in Washington in violation of the rights of the states, and of the people, reserved to them under the Tenth Amendment and has opened wide the gates to Socialism-Communism, which he asserts is impossible under a decentralized government.

The unforgivable sin which Mr. Long ascribes to the Court is that by its policy of "reverse interpretation" it has assumed the function and is attempting to exercise the power to amend the Constitution of the United States, a function expressly reserved to the people under its provisions. It is Mr. Long's position that an opinion of the Supreme Court interpreting a provision of the Constitution is integrated into and becomes a part of the Constitution itself and that any different interpretation thereafter placed upon it must, to be valid, be by amendment in the manner provided in the Constitution. He contends its binding effect upon the Court is therefore based upon considerations more deeply rooted than upon the common law rule of *stare decisis*—which is not applicable in constitutional law. In other words, his position is, in effect, when the Court has once interpreted a provision of the Constitution, based upon full exploration of the intent of the framers, it has exhausted its jurisdiction and power, under our constitutional system, to consider it further except to enforce it as interpreted, leaving any change to the amendatory process of Article V.

The Court prior to 1937 never expressly enunciated this as a principle of law but its history as gathered from its decisions according to Mr. Long's research might well be interpreted to harmonize with his views, in which the writer of this review concurs after examining the authorities cited by him.

M. T. PHELPS
The Supreme Court of the State of Arizona

FEDERAL INCOME TAXATION OF FARMERS. *By Harry M. Halstead. Published by the Committee on Continuing Legal Education of The American Law Institute collaborating with the American Bar Association, 133 South 36th Street, Philadelphia 4, Pennsylvania. 1956. $3.00. Pages 129.*

Of the many far-reaching changes which have occurred in the American economy since World War II, none is more dramatic than the technological revolution in farming. Despite all political efforts to cushion the farmer against change, the successful farmer today must be a competent businessman. His operations require a large investment in plant and equipment and must be of sufficient size to be economical for the particular type of farming involved. This means that a farmer, just like any other person whose business requires substantial capital assets and who is engaged in operations necessitating large amounts of working capital, must always plan his capital investments and his yearly operations with the tax consequences in mind if he hopes to be reasonably successful in our present economy.

It is therefore particularly appropriate that the Committee on Continuing Legal Education of the American Law Institute has issued another of its excellent series of practical texts, this one dealing specifically with the "Federal Income Taxation of Farmers". Harry M. Halstead, its author, is a member of the Los Angeles, California, Bar and is chairman of the Subcommittee on Tax Problems of Farmers of the Section of Taxation of the American Bar Association. He has specialized in tax problems of farmers and is well qualified to discuss this subject. He has written the text for the general practitioner and also for his farmer client in clear, nontechnical language whenever possible. His aim is to acquaint them with many of the everyday tax problems faced by farmers and how they should be handled.

The text explains first just who a farmer is for tax purposes and how to differentiate him from the hobby farmer. It is then broken down into chapters which discuss problems of particular significance to farmers. The chapter on "Accounting Methods, Records, and Returns of Farmers" explains the various accounting methods a farmer may use and the advantages and disadvantages of each, what sort of records to keep and why, the selection of the taxable year, and the filing of the return. Various items of gross income and business deductions of farmers are considered in other chapters, including such items as capital expenditures versus ordinary and necessary expenses.

The chapter on draft, breeding and dairy livestock should prove to be a particularly valuable discussion for any farmer desiring to secure the maximum tax advantages from such operations.

Although it is somewhat unfortunate that the text was necessarily keyed to the regulations under the Internal Revenue Code of 1939, any substantive changes in the law which are now embodied in the Internal Revenue Code of 1954 have been included in the discussion.

Anyone who desires a general summary of how our federal income tax applies to the farmer and his particular problems will find this text well worthwhile.

A. L. Burford, Jr.
Los Angeles, California

PART-TIME LEGAL EDUCATION. *A Study of the Problems of Evening Law Schools. By Joseph T. Tinnelly, C.M. New York: The Foundation Press, Inc. 1957. $3.50. Pages 205.*

Dean Tinnelly has titled his book too modestly. While his focal point is indeed the part-time law school, much of what he has gathered into this study relates fully as much to the full-time law schools of Michigan, Baylor, Stanford or North Dakota.

Essentially, this book is at once a primer and a capsule compendium concerned with present-day formal legal education in the United States.

While his announced purposes include "to make clearer the problems met in part-time legal education and to suggest methods by which they may be attacked", Dean Tinnelly has recognized the impossibility of discussing the evening schools without almost equivalent reference to and comparison with the full-time schools, which, like the part-time schools, also have their problems.

His discussion ranges over such apparently diverse yet inevitably related matters as the criteria for selection of students on the one hand to the adequacy of ventilation in the law library on the other. While the maximum acceptable height of a step ladder in the stack area of the library (twenty-four inches) may seem a trivial detail, yet this study makes it clear that it is attention to such details, along with thoughtful and continuing attention to quality of student body, curriculum, faculty, scheduling and other major matters, which enables a law school to function smoothly and to accomplish the objective of "training students to become lawyers".

One chapter of particular excellence is devoted to an analysis of the types of teachers and of their methods of teaching, comparing and giving examples of the skilled, the inept, the stimulating and the tedious. Each example evokes the memory of an old friend—or at least an old acquaintance—of law school days.

Elsewhere, he analyzes the "typical" part-time student *vis à vis* the full-time student, from the law review student to the fraternity loafer. These "typical" law students share with all other composite sons of statistics the unreality which characterizes the "typical" family of one neighborhood in my city which has 2.19 children and three fourths of an electric dishwasher.

Nevertheless, beneath the statistics and the scholarly assemblage of factual information in this book moves the all too real picture of a moderately heroic but somewhat desperate and even pathetic figure—the part-time law student. He struggles to make ends meet, to satisfy his family obligations, to keep his job, to prepare for classes, to overcome fatigue at the end of each long day, and to be receptive to the hoped-for intellectual stimulus of his evening classes. This portrayal is not articulated quite so starkly in Dean Tinnelly's book, but the picture is inescapably there and the character emerges as the oblique references in the text gradually delineate it. This story of the efforts and sacrifices of the part-time law student inspires the reader's admiration and enlists his desire to see these efforts bear fruit in the creation of a successful, able and reputable member of the legal profession.

At the same time, misgivings as to the present adequacy of this type of legal education are unavoidable. These same misgivings may have had much to do with causing Dean Tinnelly to write this book, and thus to put together a coherent and sufficiently complete analysis to furnish a useful frame of reference for further attack upon the problems which admittedly confront the average evening law school. I believe he has succeeded in this, and as indicated before, has done more than that in giving to us a bird's-eye view of legal education in all its departments. This view is enriched by the footnotes containing quotations from many of the leaders of legal education of the last hundred years in the United States.

That it will be widely read by part-time law school people is a foregone conclusion. But its title should not

limit its audience to such a specialized group. The law teaching profession generally will find much to consider, and the practicing lawyer, whose awareness of the complexities of effective law school administration may be limited to his own hazy recollections of classroom discussion and examination days will find this book to be a provocative educational experience in itself.

PETER H. HOLME, JR.

Denver, Colorado

THE LAW OF AWOL. *By Alfred Avins. New York: Oceana Publications. 1957. $4.95. Pages 288.*

A serious concern of every commanding officer of combat troops or a fighting ship is a potential loss of combat personnel through both sickness and disciplinary action. Military discipline is closely related to combat efficiency, and the administration of military justice has always been considered one of the responsibilities of command. An officer skilled in military law is a valuable member of a military unit. Until recent times, however, this subject matter was largely an unknown science except for the streamlined courses at training camps. To a degree it is still a dark secret to the bulk of the enlisted cadre.

In my opinion, command efficiency is bound to suffer when military law reaches the point of important interference with command prerogative. The overwhelming percentage of combat commanders hope for nothing more fervently than a command without the necessity of convening courts and with no problem of a brig list to complicate the departure for a target area. Military punishment has been and will always be necessary in a military unit —not as a curative or therapeutic specific for a wayward file, but rather as the "horrible" example of what can happen to you "if you don't watch out".

The administration of military law with the advent of the new code has become far more complicated than in the generation past. A military lawyer must know his stuff today and must be able to make a proper record for review when necessary. Fidelity to the client—the accused—requires greater application than heretofore to the fine points of the law such as are so carefully collated by Mr. Alfred Avins in his comprehensive digest *The Law of AWOL.* This book combines a statement of the law of AWOL itself with both discussion and interpretation as well as a reference to the authorities supporting each of the numerous points and subpoints made by the author.

This octavo of something less than 300 pages can serve the practicing military lawyer, whether professional or civilian, as primer, digest and treatise. With it alone as his legal bible he is enabled to prepare a case for trial and defend it through the last court of military resort. If comment might be made as to its format, in the humble opinion of the undersigned it would have been additionally helpful if this excellent silent military aide were divided into two sections, one for the continuous narrative of the law with references to a second section in which the digest of the authorities was collected for ready reference.

The book has a carefully compiled list of authorities as well as references. A later edition will undoubtedly contain a larger index which will serve as an *aide-memoire* for the not too carefully trained civilian and it will be discovered that this worthwhile book is a veritable treasure trove.

MELVIN L. KRULEWITCH
Major General, U.S.M.C.R.

New York, New York

AUTOMOBILE LIABILITY INSURANCE CASES. *By Norman E. Risjord and June M. Austin. Publishers: Kansas City, Missouri: Risjord and Austin. $45.00.*

This single loose leaf volume is one of the most significant works published in recent years for members of the insurance Bar. The development of a wealth of case law pertaining to the construction of standard automobile liability insurance policies has created a need for a service which can quickly, easily and accurately direct the lawyer to reported cases that have considered coverage questions factually related to his own.

This need has very ably been met by this work, which contains the 1947, 1955 and 1956 basic automobile liability standard provisions. A new revised standard automobile policy is to be included in a second supplement to be published in the fall of 1958.

Opposite each of the policy provisions included in the volume are references to applicable chapter numbers in an Outline of Cases. A Table of Chapters is also helpful in selecting appropriate chapters in the Outline of Cases. The latter contains a detailed and comprehensive outline of standard policy provisions, and contains references to all pertinent reported cases. Chapter headings in the Outline refer to particular policy provisions, and subheadings refer to specific issues involved in their interpretation. Included in the Outline are references, by state and district, to all cases which have dealt with any particular question.

The present volume, which includes an April supplement, contains a clear and concise summary of each of the 1534 cases reported in all jurisdictions since the standard basic automobile liability policy was promulgated in 1936. Both state and federal decisions are included. After each case summary, the authors have made "comments" which refer to applicable policy provisions and, in many instances, raise questions as to the effect of a decision.

Although the volume was not intended as a text book and the cases are not annotated, it is a very useful tool which saves the lawyer with an automobile liability policy coverage question many research hours. With this single volume, a lawyer with a given set of facts can easily and quickly, by reference to the standard provisions, chapter headings, and Outline of Cases, find all reported cases of all jurisdictions which have dealt with particular policy provisions. The reading of the digests of these cases enables the lawyer to narrow his actual reading and research only to those cases that involve facts most nearly identical with his own.

WYATT JACOBS

Chicago, Illinois

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Admiralty . . .
unseaworthiness

McAllister v. *Magnolia Petroleum Company*, 357 U. S. 221, 2 L. ed. 2d 1272, 78 S. Ct. 1201, 26 U. S. Law Week 4463. (No. 83, decided June 23, 1958.) *On writ of certiorari to the Court of Civil Appeals of Texas, Fifth Supreme Judicial District. Judgment vacated and cause reversed.*

In this decision, the Court held that a state court might not apply its own two-year statute of limitations to bar an unseaworthiness action that was joined with an action for negligence under the Jones Act.

The petitioner was a member of the crew of a vessel owned and operated by the respondent. In October, 1950, he slipped and fell down a gangway leading to the galley, injuring his back. Medical attention failed to arrest a deteriorating condition, and in 1953, the petitioner could no longer work at his job. He filed suit in Texas, claiming damages under the Jones Act for negligence and under the general maritime law for unseaworthiness and maintenance and cure. The trial court awarded judgment for the respondent on the Jones Act and unseaworthiness counts, and awarded the petitioner $6,258 for maintenance and cure. Both parties appealed. The Texas Court of Civil Appeals affirmed the award for maintenance and cure, but denied the appeal on the unseaworthiness count. Petitioner took no appeal on his claim under the Jones Act, and the state court ruled that the unseaworthiness action was barred by Texas' two-year statute of limitations for personal injury actions.

On reviewing the case, the Supreme Court, speaking through the CHIEF JUSTICE, held that when an action for unseaworthiness is combined with an action under the Jones Act, a state court cannot apply a shorter limitations period than the three-year period prescribed by Congress in the Jones Act. The Court pointed out that under *Baltimore SS. Company* v. *Phillips*, 274 U. S. 316, which held that Jones Act claims and unseaworthiness claims were alternative grounds of recovery for a single cause of action, a judgment in an unseaworthiness action was a bar to recovery under the Jones Act. Since this is so, the Court said, the seaman must sue for both remedies in order to make full utilization of his remedies for personal injury. If the state courts were to impose a shorter limitations period, that would fall short of affording seamen "the full benefit of the federal law", the Court said.

In a concurring opinion, Mr. Justice BRENNAN denied any suggestion that the Court was intimating that the state limitations period would be applicable if it were longer than the federal period. The question is whether federal or state law determines the limitations period, he said. In his view, the Court was holding that the federal limitations period was the proper one.

Mr. Justice WHITTAKER, joined by Mr. Justice FRANKFURTER and Mr. Justice HARLAN, dissented, arguing that the Jones Act and a libel for unseaworthiness are distinct and independent causes of action. The Jones Act, which gives the seaman a federally created right, has a three-year limitations period; but the dissent argued that a libel for unseaworthiness should follow the general rule that state limitations periods apply when there is no federal period prescribed.

The case was argued by Arthur J. Mandell for the petitioner and by Frank C. Bolton, Jr., for the respondent.

Arrest . . .
search and seizure

Miller v. *United States*, 357 U. S. 301, 2 L. ed. 2d 1332, 78 S. Ct. 1190, 26 U. S. Law Week 4448. (No. 126, decided June 23, 1958.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed.*

This decision overturned a conviction of violation of the federal narcotics laws on the ground that marked money admitted in evidence had been illegally obtained by the arresting officers.

The officers appeared at the apartment occupied by the petitioner in Washington at 3:45 A.M. One of the officers knocked on the door, and, in reply to the question "Who's there?" replied "in a low voice" "Police". The door was opened on an attached chain and the petitioner asked what was wanted, then attempted to close the door. Thereupon, the police put their hands inside the door and ripped the chain off. A search of the apartment turned up $100 in marked money used earlier in the evening to purchase narcotics from an alleged accomplice of the petitioner. The police had no warrant and did not expressly demand admission or place the petitioner under arrest until after they entered the apartment. The District Court convicted and the Court of Appeals affirmed.

Mr. Justice BRENNAN delivered the Supreme Court's opinion reversing. The Court held that the entry by the police officers was unlawful because they failed first to state their authority and purpose for demanding admission. From this it followed that the arrest was unlawful and that the evidence was improperly seized. The Court cited 18 U.S.C. § 3109, which provides that an officer executing a search warrant may break open a door only if "after notice of his authority and purpose", he is denied admission. This statutory requirement was substantially the same as that developed in the District of Columbia, the Court noted, and em-

Reviews in this issue by R. Young

bodies one of the oldest principles of Anglo-American law. The Court refused to hold that this was a case where the petitioner already knew the identity and purpose of the visitors so as to make their announcement a useless gesture.

Mr. Justice HARLAN announced that he concurred in the result.

Mr. Justice CLARK, joined by Mr. Justice BURTON, wrote a dissenting opinion which argued that the record showed that the petitioner was fully aware of who the officers were and why they had come, and that "split second" action on the part of the police was necessary or the arrest would have been thwarted.

The case was argued by De Long Harris for the petitioner and by Leonard B. Sand for the United States.

Commerce . . . *local regulation*

Chicago v. *Atchison, Topeka and Santa Fe Railway Company, Parmelee Transportation Company* v. *Atchison, Topeka and Santa Fe Railway Company*, 357 U. S. 77, 2 L. ed. 2d 1174, 78 S. Ct. 1063, 26 U. S. Law Week 4431. (Nos. 103 and 104, decided June 16, 1958.) *No. 103 on writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed. No. 104 on appeal from and petition for certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed.*

This decision held that the City of Chicago could not require a motor vehicle service operating between various railroad stations in the city to obtain a certificate of convenience and necessity from the City Commissioner of Licenses. The Court ruled that the certificate requirement was an interference with interstate commerce.

The issue arose in 1955 when the railroads operating in and through Chicago decided to abandon their arrangement with the Parmelee Transportation Company under which it carried through passengers between the city's eight railroad stations without special charge. The railroads organized their own service, the Railroad Transfer Service. After the railroads announced their intention of abandoning the Parmelee service, the City Council amended the municipal code of Chicago by adding Section 28-31.1, so as to require a certificate of public convenience and necessity before a license could issue for transfer vehicles, the Council reserving final discretion to determine how many, if any, licenses were to be issued. Parmelee was permitted to continue to operate without leave since no certificate was required for the renewal of an existing license. The new Transfer service began to operate on October 1, 1955, but it refused to apply for a certificate of convenience and necessity, taking the position that the new section of the municipal code was either inapplicable to it or, if applicable, invalid. The city rejected this contention and threatened to arrest and fine Transfer's drivers. Transfer and the railroads then began this action in the United States District Court asking that Section 28—31.1 be declared either invalid or inapplicable to Transfer. The city moved for summary judgment, and Parmelee was permitted to intervene as a defendant. The district judge granted the city's motion, but the Court of Appeals reversed, holding that while Section 28-31.1 applied to Transfer, it was repugnant on its face to the Constitution and laws of the United States.

Speaking through Mr. Justice BLACK, the Supreme Court affirmed. The Court held that the judgment of the Court of Appeals was final so as to permit review under 28 U.S.C. § 1254(2). Under that section, said the Court, cases are reviewable when a Court of Appeals has held a state statute invalid as repugnant to the Constitution, treaties or laws of the United States, thus refusing an invitation by Parmelee to overrule *Slaker* v. *O'Connor*, 278 U. S. 188.

The Court also ruled that Parmelee had standing to secure a review of judgment below, since there was an actual controversy in which Parmelee had "a direct and substantial personal interest in the outcome"; the Court rejected an argument that the federal courts should not pass on the validity of Section 28-31.1 until it had been authoritatively construed by the state courts. It was the city's position that 28-31.1 applied to Transfer, the Court noted, and the city had made no move to have the matter remitted to the state courts. Furthermore, there was no ambiguity in the ordinance that called for interpretation by the state courts—the ordinance clearly applied to Transfer, the Court said.

In holding the ordinance invalid, the Court pointed out that the Interstate Commerce Act clearly authorized, if it did not require, the railroads to provide for the transfer of persons and property between connecting lines. "Serious impediments to the efficient and uninterrupted flow of this traffic might well result if the city could deny the railroads the right to transfer passengers by their own vehicles or by those of their selected agents" the Court declared. It added that of course the city retained considerable authority to regulate how transfer vehicles should be operated over the streets of the city, and that the city could also require registration of the vehicles and exact reasonable fees for the use of the streets.

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER and Mr. Justice BURTON, dissented on the ground that the Court acted prematurely in striking down the ordinance. ". . . the validity of the ordinance should not be determined until Transfer has applied to Chicago for a 'terminal' license and the local authorities have had an opportunity to act on the application" the dissent said.

The cases were argued by Joseph F. Grossman for the petitioner in No. 103, by Philip B. Kurland for the appellants-petitioners in No. 104, and by Amos M. Mathews for respondents in No. 103 and appellees-respondents in No. 104.

Constitutional law . . . *eminent domain*

United States v. *Central Eureka Mining Company*, 357 U. S. 155, 2 L. ed. 2d 1228, 78 S. Ct. 1097, 26 U. S. Law Week 4404. (No. 29, decided June 16, 1958.) *On writ of certiorari to the United States Court of Claims. Reversed.*

This decision held that a 1942 order of the War Production Board closing nonessential gold mines was not a taking of private property for public use for which the Government had to pay

compensation under the Fifth Amendment.

Early in World War II, a critical shortage of nonferrous metals developed, particularly copper, and there was a comparable shortage of machinery and supplies to produce them. The War Production Board issued a series of orders establishing priorities on the production of mining equipment, and prohibiting the mines considered to be nonessential, like gold mines, from acquiring new equipment. Soon there was a severe shortage of skilled miners, and the WPB issued its Order L-208, directing gold mines to close down. No physical possession of the mines was taken and the mine owners were not required to dispose of any machinery or equipment. The order was apparently issued in the hope that skilled miners would transfer to essential mines.

In 1950, the respondents filed this suit for compensation in the Court of Claims, which referred the case to a commissioner who held hearings and filed a report. The Court of Claims, two judges dissenting, held that L-208 was an arbitrary order, without rational connection with the war effort, and awarded compensation.

The Supreme Court was faced with two issues on certiorari: First, whether or not an Act of July 14, 1952, granting jurisdiction to the Court of Claims to hear complaints of the owners of the mines affected by the order, was a mandate to that Court to award compensation for whatever damages were suffered as a result of L-208, and second whether L-208 was a taking of private property for public use within the meaning of the Fifth Amendment.

Speaking for the Supreme Court, Mr. Justice BURTON held that the Act of July 14, 1952, was merely a waiver by the United States of the statute of limitations and the defense of laches. The Court pointed out that the statute of limitations had run on many claims of owners of gold mines affected by L-208 at the time that the Court of Claims had ruled in favor of the miners in this case. The legislative history indicated, the Court said, that all Congress intended to do was to grant an additional year in which such claims could be filed.

As for the merits, the Court said that the damage to the mine owners was incidental to the Government's lawful regulation of matters reasonably deemed essential to the war effort. The Government did not occupy or use the mines, the Court pointed out, and it had no need or use for them. All it sought was to conserve mining equipment and manpower for more essential war uses.

In a dissenting opinion, Mr. Justice FRANKFURTER argued that the case should be remanded to the Court of Claims for an "authoritative construction" of the Act of July 19, 1952. "It is startling doctrine" the dissent declared, "to construe the Constitution in order to avoid difficult questions of statutory interpretation."

Mr. Justice HARLAN also wrote a dissenting opinion which argued that the Fifth Amendment required payment of compensation to the mine owners. In his view, the case was legally the same as if the Government had taken physical possession of the mines and allowed them to lie fallow.

The case was argued by Assistant Attorney General Doub for the United States and by Edward W. Bourne for the respondents.

Constitutional law . . . *full faith and credit*

Hanson v. *Denckla*, *Lewis* v. *Hanson*, 357 U. S. 235, 2 L. ed. 2d 1283, 78 S. Ct. 1228, 26 U. S. Law Week 4467. (Nos. 107 and 117, decided June 23, 1958.) *No. 107 on appeal from the Supreme Court of Florida. Reversed and remanded. No. 117 on writ of certiorari to the Supreme Court of Delaware. Affirmed.*

The issue here was whether Florida law or Delaware law controlled the right to some $400,000, part of the corpus of a trust established in Delaware by a settlor who was a domiciliary of Florida at the time of her death.

The trust was created in Delaware in 1935. The settlor, at the time a resident of Pennsylvania, retained considerable control over the corpus and reserved a power of appointment either *inter vivos* or by testament. In 1944, the settlor moved to Florida where, in 1949, she executed her will. At the same time she executed the power of appointment in favor of two of her grandchildren. She died in 1952 and her will was admitted to probate in Florida. The residuary clause of the will provided that the residue of the estate "including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me . . ." should pass to two of her daughters. In a declaratory judgment suit brought in Florida, the Florida court ruled that it lacked jurisdiction over certain nonresident defendants who had not been personally served (this included the trustee, a Delaware company) but that the power of appointment was testamentary in nature and was therefore void under Florida law. Accordingly, it ruled that the $400,000 passed under the residuary clause of the will. Before entry of the Florida decree, however, the executrix instituted a declaratory judgment suit in Delaware, and the Delaware court ruled that the trust and the power of appointment were valid under Delaware law. The executrix then moved to dismiss the Florida suit, then pending on appeal. The Florida courts refused to dismiss, and the Florida Supreme Court affirmed its chancellor's conclusion that the trust was invalid in Florida because the settlor had retained too much control over the trustee and the corpus and that the power of appointment was a testamentary act not complying with the statute of wills in Florida. In a motion for rehearing, the issue of full faith and credit was raised for the first time. Both Florida and Delaware refused to give full faith and credit to the judgments of the other court.

The CHIEF JUSTICE delivered the opinion of the Supreme Court, which held that the Delaware judgment was entitled to full faith and credit. The Court said that, since the situs of the trust property and the trustee was in Delaware, the Florida court had no *in rem* jurisdiction. The Court also felt that the fact that the settlor was domiciled in Florida was not a sufficient affiliation with the property to serve as the base for jurisdiction. Nor

could the Court find any *in personam* jurisdiction over the trustee, which did no business in Florida and had no office there. The trust was created in Delaware by a trust company incorporated in that state and a settlor domiciled at the time in Pennsylvania, the Court said. Furthermore, since Florida law holds that a trustee is an indispensable party to litigation affecting a trust, the Court said that the Florida decree had to be reversed even as to the appellants over whom Florida had personal jurisdiction.

In affirming the Delaware judgment, the Court said that Delaware was under no obligation to give the Florida decree full faith and credit because Florida's decree was offensive to the Fourteenth Amendment.

In a dissenting opinion, Mr. Justice BLACK, joined by Mr. Justice BURTON and Mr. Justice BRENNAN, argued that Florida had a "close and substantial connection" with the disposition of the estate, since the settlor was domiciled there, the will was probated there, and most of the beneficiaries resided there. The dissent argued that the corpus of the trust, consisting of intangibles, really had no situs at all, and, furthermore, the dissent contended that the Court should stay its hand until the Florida courts determined whether the trustee was an indispensable party to the controversy.

Mr. Justice DOUGLAS, also dissenting, took the view that the trustee was in privity with the settlor, who was domiciled in Florida, and in view of the close control the settlor had kept over the trust, the trustee was in reality merely a stakeholder.

The case was argued by William H. Foulk for the appellants in No. 107, by Arthur G. Logan for the petitioners in No. 117, by Sol A. Rosenblatt for the appellees in No. 107 and by Edwin D. Steel, Jr., for the appellees in No. 117.

Labor law . . . "*hot cargo*" *clauses*

Local 1976, United Brotherhood of Carpenters and Joiners of America, A.F.L. v. *National Labor Relations Board, National Labor Relations Board* v. *General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 850, International Association of Machinists* v. *National Labor Relations Board*, 357 U. S. 93, 2 L. ed. 2d 1186, 78 S. Ct. 1011, 26 U. S. Law Week 4424. (Nos. 127, 273 and 324, decided June 16, 1958.) *No. 127 on writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Nos. 273 and 324 on writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Nos. 127 and 324 affirmed. No. 273 reversed and remanded.*

These cases dealt with the so-called "hot cargo" clauses in collective bargaining agreements, holding that the existence of such a clause in an agreement is no defense to a charge of unfair labor practices against a union.

In No. 127, the members of a union refused to hang doors made by nonunion labor, and the Board found that the union had induced and encouraged the employees to engage in a strike in order to force the general contractor to cease doing business with the manufacturer of the doors. In Nos. 273 and 324, the Machinists had struck a plant of the American Iron and Machine Works, and pickets prevented normal delivery of freight by the regular carriers. American Iron used its own trucks to take freight to and from the carriers, the Machinists followed the trucks to their destinations and picketed the carriers. The Teamsters thereupon instructed their members not to handle the freight. Both unions had hot cargo clauses in their contracts. The Board found that the unions had violated Section 8(b)(4)(A). The District of Columbia Circuit set aside the unfair labor practice order as to the Teamsters because of the hot cargo provision, but it enforced the order against the Machinists.

The Supreme Court's opinion was written by Mr. Justice FRANKFURTER. The Court admitted that the argument was strong for holding that a hot cargo clause is a defense to an unfair labor practice charge: The employer has agreed that his employees shall not handle the goods, and because of that it cannot be said that there is a "strike or a concerted" refusal on the part of the employees; if the purpose of the statute is to protect neutrals from union pressure, it should not extend to an employer who has agreed to a hot cargo provision. Nevertheless, the Court said, the argument on the other side was stronger: The freedom of choice for the employer is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation. This is so because the employer can make an intelligent choice only "under the impact of a concrete situation when judgment is most responsible, and not merely at the time a collective bargaining agreement is drawn up covering a multitude of subjects, often in a general and abstract manner. . . ." As a practical matter, the Court reasoned, the hot cargo provision may well not have been the choice of the employer free from the kind of coercion that Congress has condemned—it may have been forced upon him by conduct that would be a violation of the act if used directly to get him to enter into a boycott. The Court conceded that if an employer does truly sanction and support the boycott, there is no violation of the statute, but it felt that the Board was not being unreasonable in insisting that the union must not appeal to the employees or induce them not to handle goods or products. The Court emphasized the fact that it was not holding hot cargo clauses invalid, but was merely holding that a hot cargo clause is not a defense to a charge of violation of Section 8(b)(4)(A).

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE and Mr. Justice BLACK, wrote a dissenting opinion which took the position that the hot cargo clause in a contract was bargained for like every other provision in the contract and that it was the product of bargaining, not coercion. The Court was making policy, the dissent complained, and in doing so, it was acting "more like a Committee of the Congress than the Court".

The cases were argued by Arthur Garrett for the petitioners in No. 127, by Dominick L. Manoli for the National Labor Relations Board, by Louis P. Poulton for the petitioner in No. 324, and by Herbert S. Thatcher for the respondent in No. 273.

Procedure . . . *dismissal for failure to produce documents*

Société Internationale pour Participations Industrielles et Commerciales, S.A., v. *Rogers*, 357 U. S. 197, 2 L. ed. 2d 1255, 78 S. Ct. 1087, 26 U. S. Law Week 4396. (No. 348, decided June 16, 1958.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed and remanded.*

This case arose out of intricate litigation arising under the Trading with the Enemy Act. The petitioner, a Swiss holding company, sought to recover assets seized under the act by the Alien Property Custodian. The assets consisted of cash in American banks and approximately 90 per cent of the capital stock of General Aniline & Film Corporation, a Delaware corporation, and were valued at more than $100,000,000. The petitioner sought recovery of the assets on the ground that it was the national of a neutral power. The Government challenged this claim, asserting that the petitioner was an "enemy" under the statute since it was intimately connected with I.G. Farben, and the Government further alleged that the petitioner had conspired with I.G. Farben, H. Sturzenegger & Cie., a Swiss banking firm, and others to conceal the ownership by I.G. Farben of property owned by Farben in the United States and elsewhere, in order to avoid confiscation in the event of war.

The present case arose when the Government sought, under Rule 34 of the Federal Rules of Civil Procedure, an order requiring the petitioner to produce for inspection and copying a large number of the banking records of Sturzenegger. Petitioner denied that it controlled the records. A series of motions followed, petitioner seeking to be relieved of production of the documents on the ground that their disclosure would violate Swiss laws prohibiting economic espionage, and would subject them to criminal penalties in Switzerland. During this time, the Swiss Federal Attorney, acting under the Swiss law, "confiscated" the documents in question, the confiscation amounting to an interdiction on their transmittal to third parties, since they remained in the physical possession of Sturzenegger. The District Court appointed a special master, who concluded that the Swiss Government had acted in accordance with its own laws, that there was no proof of collusion between the petitioner and the Swiss Government and that the petitioner had sustained its burden of showing good faith efforts to produce the documents. The District Court nevertheless directed dismissal of the proceedings for failure to produce the records, and the Court of Appeals affirmed.

Speaking through Mr. Justice HARLAN, the Supreme Court reversed and remanded. The Court first held that the documents were in the "control" of the petitioners within the meaning of Rule 34. The fact that Swiss penal law prohibited petitioners from producing the documents did not justify a holding that they had no "control" over them, the Court said, in view of the broad purposes of the Trading with the Enemy Act, and the District Court was justified in ordering production. The Court also held that Rule 37 of the Federal Rules of Civil Procedure authorized the District Court to dismiss a complaint for failure to comply with the production order, but the Court held that in view of the findings of the special master that the petitioners acted in good faith in their efforts to obtain release of the documents, "Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner". The Court pointed out that summary seizure of property believed to be enemy owned is constitutionally permissible only because a non-enemy claimant is entitled to a later judicial hearing as to the propriety of the seizure. The Court pointed out that the non-production of the documents might prove to be a serious handicap to the petitioner in its efforts to recover the assets, since it had the burden of proof of showing itself not to be an "enemy" within the statutory language.

Mr. Justice CLARK took no part in the consideration or decision of the case.

The case was argued by John J. Wilson for the petitioner and by Solicitor General Rankin for the respondents.

Procedure . . . *diversity jurisdiction*

Byrd v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 2 L. ed. 2d 953, 78 S. Ct. 893, 26 U. S. Law Week 4297. (No. 57, decided May 19, 1958.) *On writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Reversed and remanded.*

The petitioner was employed as a lineman by a contractor engaged in building power lines for the respondent. He was injured while connecting a power line to a new substation, and sought and received the benefits of the South Carolina Workmen's Compensation Act. He then filed this suit in the Federal District Court against the respondent, based on diversity of citizenship since he was a resident of North Carolina. The case went to the jury which awarded him a verdict. On appeal, the Court of Appeals reversed, holding that, because the work his employer was doing was the same kind of work as that done by the respondent, he was, under South Carolina law, a "statutory employee" of the respondent and was therefore barred from suing the respondent at law, his exclusive remedy being the statutory compensation benefits. On certiorari before the Supreme Court, there were two questions: (1) Had the Court of Appeals erred in directing judgment for the respondent without remanding to give petitioner an opportunity to introduce further evidence on the question of his status as a "statutory employee" of the respondent? (2) Was the petitioner entitled to a jury determination, state practice to the contrary, of the factual issues?

The opinion of the Supreme Court was delivered by Mr. Justice BRENNAN. The question whether petitioner was a statutory employee of the respondent depended on whether the respondent was engaged in the same kind of work —that is, building power lines—as the employer. The Court found that the testimony on this point was not altogether clear, but it held that the issue

was one that should have been determined by the trial court, and that the Court of Appeals erred in not remanding to the trial court for a specific determination of the question.

As for the second problem, whether the issue was to be determined by a jury or by the trial judge, the Court refused to accept the argument that the question should be settled by applying the doctrine of *Erie* v. *Tompkins*. The federal system is an independent system, the Court reasoned, and there is a strong federal policy against allowing state rules to disrupt the judge and jury relationship in the federal courts. Moreover, the Court was not sure that the outcome of the case would be different, so there was no good reason for applying the *Erie* rule.

Mr. Justice WHITTAKER wrote an opinion concurring in the Court's opinion insofar as it held that the petitioner was entitled to have the issue of his status as a statutory employee determined by the trial court, but dissenting from the Court's holding that the petitioner was entitled to have the question decided by a jury. In this view, the latter question was premature and should not have been decided at this stage.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which Mr. Justice HARLAN joined. This opinion argued that the Court of Appeals' decision was "entirely consistent" with South Carolina law as determined by the state supreme court and that it would have been proper to reverse the Court of Appeals only if its judgment was baseless. "We are not to read the record as though we are making an independent examination of the trial proceedings" the opinion argued. "We are sitting in judgment on the Court of Appeals' review of the record."

Mr. Justice HARLAN wrote a brief dissenting opinion, agreeing with Mr. Justice FRANKFURTER, adding further that since there was no dispute that respondent was engaged in furnishing power and the construction of power lines was a necessary part of that business, no further evidence that might be adduced by the petitioner could change the result reached by the Court of Appeals. At any rate, this opinion argued, the petitioner ought to show the character of whatever further evidence it expected to introduce.

The case was argued by Henry Hammer for petitioner and by Wesley M. Walker for the respondent.

Veterans . . .
re-employment rights

McKinney v. *Missouri-Kansas-Texas Railroad Company*, 357 U. S. 265, 2 L. ed. 2d 1305, 78 S. Ct. 1222, 26 U. S. Law Week 4460. (No. 93, decided June 23, 1958.) *On writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Affirmed.*

This case involved interpretation of Section 9 of the Universal Military Training and Service Act. The petitioner contended that he was deprived of seniority rights guaranteed by the statute and by the collective bargaining agreement between the respondent railroad and the union representing its employees.

The collective bargaining agreement divided the railroad employees into three groups and provided rules of seniority for each group. Promotion was confined to the group, except that employees in Group 2 were to be given preference over non-employees in assignment to positions in Group 1, "based upon fitness and ability". When new positions are created, or vacancies occur, the openings are "bulletined" by the employer and the employees may bid therefor.

The petitioner was employed as a relief clerk-chief caller, a Group 2 position, when he was inducted into the Armed Forces in 1950. He returned in 1952 and applied for re-employment. He was placed in a Group 1 position as assistant cashier with a seniority dating as of October 7, 1952. On September 8, a month before he returned, the Group 1 position of bill clerk was bulletined, and a non-employee was assigned to it. On September 10, the Group 1 position of assistant cashier was bulletined, and a non-employee assigned. Later, petitioner's Group 1 position was abolished, and he was reduced to a Group 2 position. The petitioner brought this suit, alleging that he was entitled to a Group 1 seniority as of September 8 or 10, the dates on which, had he been employed by the railroad, he could have applied for the bulletined Group 1 positions. Such a seniority date would have placed him ahead of the non-employee bill clerk when his position as assistant cashier was abolished. The District Court dismissed the complaint and the Court of Appeals affirmed.

Speaking for the Supreme Court, Mr. Justice FRANKFURTER affirmed. The Court held that Section 9(c) of the statute does not guarantee the returning serviceman "a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors" the Court said. "Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute." The purpose of Section 9, the Court explained, is to guarantee the veteran "those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment". Here, the position sought by the veteran did not depend solely upon automatic progression because of seniority, but on the exercise of some discretion on the employer's part, since there were questions of fitness and ability that the Act did not override. The Court affirmed the decision below with leave to the petitioner to amend his complaint to allege, if such was the fact, that in actual practice advancement from Group 2 to Group 1 was automatic.

Mr. Justice BLACK and Mr. Justice DOUGLAS noted that they dissented on the merits.

The case was argued by John G. Laughlin, Jr., for the petitioner, by M. E. Clinton and Carroll J. Donohue for the respondents.

What's New in the Law

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Attorneys . . . *discipline and admission*

The Supreme Court of Florida has been busy exercising its jurisdiction over the Bar. In two recent cases it has (1) amended its disciplinary rule to authorize proceedings against a lawyer who joins, allies himself with or lends allegiance to the Communist Party or any of its subsidiaries, and (2) turned down with some sugar-coating a petition for relief presented by a group of persons who failed to pass the bar examination.

Amendment of the disciplinary rule was initiated by twenty-seven members of the Miami Bar, who proposed a rule recognizing that a lawyer might invoke the constitutional privilege not to answer a question as to his connection with the Communist Party, but stating that when he does so "he magnifies and intensifies existing justifiable doubt as to his loyalty [and] his privilege to practice law may be withdrawn in the public interest and for the general welfare". The Florida Bar joined the proceeding with its own suggestion for an amendment. This would have provided that in a regular disciplinary proceeding a refusal to answer the Communist question would "constitute prima facie evidence that the lawyer is unfit to continue to exercise the privilege of practicing law".

The Court declared that it was in sympathy with the objective apparent in both proposals, but it added that neither would afford the protection contemplated by the Court's decision in *Sheiner* v. *Florida*, 82 So. 2d 657, in which it held that membership in the Communist Party was not consonant with a lawyer's oath and his status as an officer of the court, but that membership in the Party could not be proved by the lawyer's refusal in another proceeding to answer whether he was a Communist.

The Court then set forth and adopted its own rule, one that places no reliance on a refusal to answer questions about Communist connections. The rule provides that any lawyer "who joins the Communist Party, allies himself with or in any way lends his allegiance to the Communist Party or any subsidiary . . . and refuses or neglects to resign from the bar shall subject himself to disciplinary action . . ." under regular procedures, and that any evidence taken by any court or governmental agency "may be introduced and accorded such weight as the Board of Governors may deem proper. . . ."

(*Petition for Revision of or Amendment to Integration Rule of the Florida Bar*, Supreme Court of Florida, July 13, 1958, Terrell, J., 103 So. 2d 873.)

In the bar examination proceeding, six persons who failed Florida's March, 1958, bar examination filed a petition for review and for admission. The Court denied the petition but threw the petitioners the sop of letting them take the next exam without regard to a three-failure rule.

The Court rejected the would-be lawyers' contention that the graders were without experience or training in education and not qualified for their tasks. But it recognized that only 46.55 per cent passed the March examination, whereas the average for the four previous tests was 73.38 per cent. It said, the examination complained of "may have been unduly difficult, particularly to new graduates of law colleges without previous legal experience".

The Court then entered an order appointing a committee to study and report on methods of admission to the Bar. The committee was directed to consider, among other things, whether the bar examination should be graded on a frequency curve or whether the diploma privilege should be restored.

Three judges, while not disagreeing with the Court's order, thought a simpler solution would be to fix the passing grade for the March, 1958, exam at 65 rather than 70, thus expanding the "narrow gap between the passing grade of 70 and the highest grade of 80.36".

(*In re Lanza*, Supreme Court of Florida, July 11, 1958, *per curiam*, 104 So. 2d 342.)

Attorneys . . . *discipline of judges*

The Supreme Court of Ohio, speaking in a field where there is a wide variety of authority, has held that a judge is subject to professional discipline for acts committed in his judicial capacity which are in violation of the Canons of Judicial Ethics. Only recently the Supreme Court of Colorado, in *Petition of the Colorado Bar Association*, 325 P. 2d 932 (44 A.B.A.J. 780; August, 1958), ruled that a judge was immune to professional discipline and that his acts of misconduct could be reached only by impeachment.

While the Ohio ruling is square on the point, these factors, present in Ohio but not in all other states, had some bearing on the decision: (1) the Canons of Judicial Ethics have been incorporated into the rules of the Supreme Court; (2) the Court has declared that the Canons shall be "binding" and that a "wilful breach thereof shall be punished by reprimand, by suspension or by disbarment"; (3) the Supreme Court rule relating to the scope of the Court's disciplinary authority provides that the Court's commissioners may act concerning complaints against and prac-

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

tices of "judges"; (4) the Supreme Court rule defines "misconduct" as including a violation of the Canons of Judicial Ethics; and (5) by statute judges must be admitted to the Bar.

Putting these factors together and stressing the last, the Court declared:

> ... since an attorney at law does not, upon assuming a judicial position, cease to be a member of the legal profession, but becomes such a member who has assumed a position of public trust which demands of him an even greater degree of responsibility and an even higher and more specialized standard of conduct than that demanded of a practicing attorney, this Court, through its inherent power and duty to maintain the honor and dignity of the legal profession of Ohio at its traditionally high level, may prescribe a specialized standard of conduct for all members of such profession who hold judicial office and has jurisdiction over the discipline of such a member for acts committed in his judicial capacity which are in violation of the Canons of Judicial Ethics adopted by and made a rule of this Court prior to the commission of such acts.

The result of the case was the indefinite suspension of an attorney who was a municipal judge in Youngstown. He was found guilty of numerous violations of Canon 30, including acts of self-aggrandizement and running for a political office while still holding a judicial office. The latter violation was enhanced by the fact that he used the name of his judicial office to campaign for the votes of both major political parties.

The Court had little patience with the judge's defense that the acts complained of were done in pursuance of "judicial discretion". It said it was convinced the judge's "primary consideration as a judge of the Youngstown Municipal Court was the use of the power and prestige of that office to further and promote his own candidacy for any office for which he might later choose to run, whether judicial or non-judicial". The Court felt that "judicial discretion" could hardly explain or excuse the respondent's acts; the violations were so crude that the Court said that indefinite suspension—a serious discipline in Ohio because of the necessity of taking a bar examination as a part of being reinstated—was warranted

(*Mahoning County Bar Association* v. *Franko*, Supreme Court of Ohio, May 28, 1958, Matthias, J., 151 N.E. 2d 17.)

Attorneys . . . *solicitation*

The Supreme Court of Minnesota has cleared the way to conduct an investigation of the role played by the Brotherhood of Railroad Trainmen in the personal injury litigation of its members. All the Court needs now are some parties to start the proceeding and to guarantee the costs and expenses.

A similar proceeding was undertaken in Illinois by that state's Supreme Court on its own motion and resulted in March of this year in the Court's declaration—*In re Brotherhood of Railroad Trainmen*, 150 N.E. 2d 163 (44 A.B.A.J. 473; May, 1958)—that the union's "regional counsel legal aid" system violates ethical standards of the legal profession. Even so, the Court permitted the union to make known to its members "the names of attorneys who, in its opinion, have the capacity to handle [the union members'] claims successfully".

The Minnesota Court's invitation for a similar proceeding was the by-product of a complex set of legal maneuvers between the Committee on the Unlawful Practice of Law of the Montana Bar Association and the Brotherhood. The Committee had commenced an action in a Montana state court seeking an injunction against the Brotherhood and several individuals, including some Minnesota attorneys, on the ground that they were engaged in a nationwide program of organized solicitation. In this suit the Committee had obtained an order to take depositions in Minneapolis, but when they arrived to do so they were greeted with a restraining order issued by a Minnesota state court at the behest of the Brotherhood. The Committee then sought a writ of prohibition from the Supreme Court of Minnesota to annul the Minnesota lower-court orders.

In this setting, the Court ruled that prohibition could not issue. It declared that the exercise of power by the lower court was not unauthorized by law, because the basis of the Brotherhood's petition was that the Committee was subjecting it to vexatious litigation. Courts have power to enjoin such litigation, the Court said. Another reason to deny the writ, it continued, was that the Committee had an adequate remedy —an appeal from the Minnesota court's restraining order.

In oral argument before the Court the suggestion was made, and seconded by the other party, that the Court conduct its own investigation of the Brotherhood's role in personal injury litigation. Then the Court declared that upon the filing of a notice and assurances to meet expenses, it would appoint a district judge to hold hearings, take testimony and make findings of fact and conclusions of law.

(*Minnesota ex rel. Ryan* v. *Cahill*, Supreme Court of Minnesota, July 3, 1958, *per curiam*, 91 N.W. 2d 144.)

Censorship . . . *motion pictures*

Splitting four-to-three and with one judge joining the majority in order to let the United States Supreme Court have the final say, the New York Court of Appeals has upheld that state's new statute under which the Board of Regents of the University of the State of New York refused a license to the motion picture *Lady Chatterley's Lover*.

One section of New York's motion picture licensing law was found unconstitutional for vagueness by the Supreme Court in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495. Subsequently in 1954 the legislature added another section attempting to spell out the term "immoral" and the phrase "tend to corrupt morals". Acting under both the former and new sections, the Board of Regents denied a license to the film because it was immoral in that it portrayed "acts of sexual immorality ... as desirable, acceptable or proper patterns of behavior".

Writing for the Court, Chief Judge Conway upheld the Board's denial of a license. He found that the dominant theme of the film was "exaltation of illicit sexual love in derogation of the

restraints of marriage" and he ruled that since the picture portrayed adultery as an alluring and acceptable pattern of behavior, the Board was acting properly under the statute in refusing a license. He declared that the new statute measured up to the standard of preciseness required by Supreme Court decisions.

The majority of the Court turned down an argument that the picture was expressing an opinion and that it must be shown to present a clear and present danger of substantive evil to the community. Judge Conway said "expressions which debase fundamental sexual morality" are not entitled to constitutional protection and therefore the clear-and-present-danger test or doctrine does not apply.

Motion picture licensing demands rules and standards of its own, Judge Conway contended, because of the "greater capacity for evil which inheres" in films; they are not entitled to be judged by the same standards as books. For this reason the Court refused to say that licensing which involves a prior restraint was unconstitutional when applied to motion pictures. "There can be little doubt that the only effective remedy which society possesses lies in a system of motion picture licensing which will operate adversely only to motion pictures which are corruptive of public morality", he wrote.

Judge Desmond concurred specially by agreeing that the film fell under the statutory proscription, but, he said, "I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say."

Judges Dye, Fuld and Van Voorhis dissented, each with a separate dissenting opinion. They argued that the new statute fell short of providing fundamental standards essential for the guidance of administrative censorship, that motion pictures are entitled to the same guarantees as other media on communication and that a system of prior administrative censorship is unconstitutional.

(*Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York*, Court of Appeals of New York, May 15, 1958, Conway, J., 4 N.Y. 2d 349, 151 N.E. 2d 197.)

Conflict of Laws . . . *place of tort*

An Oregon wife has been unsuccessful in her diversity-of-citizenship action in federal court to recover for loss of consortium caused by an injury her seaman-husband received on the high seas aboard a vessel owned by residents of Delaware.

The husband had recovered under the Jones Act in a suit in an Oregon state court and had signed a release. The wife's action was commenced in the United States District Court in Oregon, which state affords a loss-of-consortium action, whereas Delaware, the state of residence of the owners of the vessel, does not. The wife cited §377 of the *Restatement of Conflict of Laws*: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place", and contended that the place of the wrong to her was Oregon, where she was deprived of consortium because of the impotency her husband suffered as a result of the injury at sea.

Wrong, the Court of Appeals for the Ninth Circuit told her. The "last event necessary" was the last act aboard the vessel causing her husband's injury, the Court held, in pointing out that the wife's interpretation of the rule would have read "where the damage was done" or "where the harm ensued" for the *Restatement's* "where the last event . . . takes place". The Court concluded: "Here the last event to make the shipowner liable for the tort to the husband occurred on the ship while on the high seas." The Court ruled the wife's complaint was properly dismissed because no loss-of-consortium action exists in maritime law.

(*Jordan* v. *States Marine Corporation of Delaware*, United States Court of Appeals, Ninth Circuit, July 15, 1958, Denman, J.)

Criminal Law . . . *telephonic eavesdropping*

The Supreme Court of New Jersey has ruled that neither the New Jersey nor the federal wire-tapping statutes prevents the testimony of a switchboard operator about an overheard telephone conversation.

The switchboard operator eavesdropped with the permission of her employer, a leather company, on the conversation of an employee of the company with a person outside the plant. Neither party to the call authorized the operator to listen. Both of them, along with three others, were convicted of conspiracy to steal the leather company's property. The caller became a witness for the state and testified to the conversation. The switchboard operator corroborated. The defendant claimed that the operator's testimony was a divulgence of the conversation in violation of the Communications Act, 47 U.S.C.A. §605, which provides "... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ." The Court should not have received the evidence, the defendant contended, because by doing so it aided in violation of the statute.

Rejecting this argument, the Court declared: ". . . a criminal statute should not be invoked in defiance of the common sense of a situation. We find it difficult to believe that Congress intended to assure privacy to conspirators brazenly employing a subscriber's facilities to pillage him." Congress did not intend that a person should not be able to monitor his own telephone to protect himself, the Court concluded.

(*New Jersey* v. *Giardina*, Supreme Court of New Jersey, June 16, 1958, Weintraub, J., 142 A. 2d 609.)

Criminal Procedure . . . *habeas corpus*

The Court of Appeals for the Seventh Circuit has ruled that a state prisoner who cannot obtain review of his conviction on a writ of error because of the unavailability of the reporter's notes is entitled to relief, but the Court has split on the nature and extent of the relief.

The petitioner was convicted of armed robbery by an Illinois court in

1948. Since then he has been in Illinois courts and on appeal to the United States Supreme Court almost countless times. He has never had a full review by writ of error of the conviction because shortly after his trial the court reporter became afflicted with multiple sclerosis and his notes became lost or destroyed, depriving the petitioner of a record of proceedings to support his claim that his conviction was unconstitutionally obtained. Finally in 1957 he presented his petition for a writ of habeas corpus to a federal district court under 28 U.S.C.A. §2243. The district judge ruled that if he couldn't get review on a writ of error, he was entitled to release.

It was this outright release of the petitioner with which two judges of the Seventh Circuit disagreed. Writing for the Court, Judge Hastings ruled that the petitioner's inability to get the transcript did not entitle him to absolute freedom, but only to a new trial, to be granted by the state court. The Court found authority in the federal statute and in cases for such a disposition.

"In reaching this conclusion", Judge Hastings wrote, "we are not unmindful of the possibility that Westbrook may never be apprehended, or of the probability of his acquittal upon a second trial because of the absence of material witnesses or for other reasons. If the order of the district court were to stand, there must also be considered the possible effect of such a decision on many other prisoners who may see a fertile field for the use of habeas corpus where the death or incompetency of court reporters occurs or where their stenographic trial notes are lost or destroyed."

Illinois argued that the petitioner should fail because he had not exhausted state remedies inasmuch as he had never presented the Illinois Supreme Court with a "bystander's bill of exceptions"—a document which almost no one has ever seen but which has been talked about since Illinois' oral argument in *Griffin* v. *Illinois*, 351 U.S. 12. Judge Hastings thought the remedy too obscure to exhaust, but Judge Schnackenberg, concurring specially, felt that the petitioner should have constructed a bystander's bill, but nevertheless concluded that he agreed with Judge Hastings' disposition.

Judge Finnegan dissented on the ground that there was no authority to grant relief and yet remand for a new trial in a state court. He doubted whether the Court had power to vacate a state conviction and he agreed with the action of the district judge in releasing the petitioner. He concluded that a "keen awareness of the proper deference owing to sovereign state action, in criminal cases especially, need not inhibit federal judges from granting state prisoners the drastic relief of release from a state penitentiary when the [Fourteenth] Amendment's clauses have been violated".

(*U.S. ex rel. Westbrook* v. *Randolph*, United States Court of Appeals, Seventh Circuit, July 8, 1958, Hastings, J.)

Criminal Procedure . . . *jury handbook*

Although the disposition of the case presented no need for doing so, the Court of Appeals for the Second Circuit has given an appraisal of the jury handbook published for use in United States district courts by the Judicial Conference and has concluded that the handbook "accomplishes a necessary purpose and that its use should be encouraged".

The defendants, seeking a new trial on various grounds, had shown only that one juror had seen the handbook and that juror said he regarded it as a generalized guide and not as instructions. The defendants had not shown any grounds for relief under these circumstances, the Court said, even if issuance of the handbook were considered a deprivation of his right to a fair trial, but it declared that it was "worthwhile" to consider the issue of the propriety of the handbook.

Possibly the Court chose to do this because the handbook has become a central issue in two Circuits recently. In the Seventh a three-judge panel, in an unreported decision, criticized the publication and granted a new trial (43 A.B.A.J. 941; October, 1957), but an *en banc* Court retracted in the published version of the case, 253 F. 2d 177 (44 A.B.A.J. 475; May, 1958). The Sixth Circuit had little trouble turning down an attack on the manual and at the same time finding it a valuable and correct guidebook. *Horton* v. *U.S.*, 256 F. 2d 138 (44 A.B.A.J. 782; August, 1958).

Now the Second Circuit has added its voice. The defendants' argument that the handbook deprived him of a fair trial was fallacious because "even a casual perusal . . . shows that it was not a set of instructions for any specific case, but rather a general guide to the duties of a juror for persons unfamiliar with this role", wrote Chief Judge Clark for the Court. "Many persons seem to believe that they have a constitutional right to an ignorant jury uninformed of their function", the Court continued. "To fulfill his function effectively, a juror should understand the place of the jury in the judicial scheme. This [jury handbook] helps to accomplish this salutary purpose with a minimum of the distortion so often found in a 'general' treatment of any subject."

(*U.S.* v. *Allied Stevedoring Corporation*, United States Court of Appeals, Second Circuit, July 11, 1958, Clark, J.)

Federal Tort Claims Act . . . *damages*

A group of Navajo Indians in Utah are having a difficult time getting and keeping a judgment against the United States for the seizure and destruction of some horses and burros.

The Indians' suit was predicated on an allegation that the animals were wrongfully and unlawfully seized and destroyed by agents of the United States Bureau of Land Management during a range clearance program. They asked for and the trial judge gave them $100,000, but the Court of Appeals for the Tenth Circuit reversed, without considering liability under the Federal Tort Claims Act or the findings as to damages, on the ground that the animals had been lawfully seized and disposed of under the Utah "abandoned horse" statute. 220 F. 2d 666. But the Supreme Court in turn reversed and remanded for specific findings as to damages. 351 U.S. 173.

On the remand, the district judge took additional testimony on damages and entered a judgment for $186,017.50. But now the Tenth Circuit has again reversed because of erroneous computation of damages and has suggested that on the next remand the district judge who has heard the case step aside because "a casual reading of the two records leaves no room for doubt that [he] was incensed and embittered" by the Government's treatment of the Indians.

The Court found three specific faults with the award of damages. First, the plaintiffs should have been required to prove replacement cost and not awarded damages on the theory the animals were unique. Secondly, the trial judge did not take into consideration that some of the herds were disposed of by other methods than seizure. Thirdly, it was error to allow damages for pain and suffering in a uniform amount to each plaintiff.

(*U.S.* v. *Hatahley*, United States Court of Appeals, Tenth Circuit, July 11, 1958, Pickett, J.)

Federal Tort Claims Act . . .
traveling soldier

A soldier is not in the scope of his employment when he is traveling on change-of-station orders, the Court of Appeals for the Ninth Circuit has ruled in granting the Government a summary judgment in a Federal Tort Claims Act case.

The soldier was traveling in his own automobile under orders transferring him from California to Texas. The orders authorized use of the automobile, for which reimbursement was made. He was involved in an accident in California, whose law governed, under 28 U.S.C.A. §1346(b), as the "law of the place where the act or omission occurred".

The Court concluded that California law is that an employee making a change from one location to another does not do so in the scope of his employment and that the employer is not liable for the negligent conduct of the employee during the travel. The Court drew a distinction between "acts done during employment" and "acts done within the scope of employment", and it noted that the doctrine of *respondeat superior* does not apply when the negligent acts occur "merely during employment". In this category it put traveling from one place to another in a change of job location.

In order to draw an analogy with civilian-employee cases, the Court concluded that there was no basis in either the Act or logic to make a "distinction which would extend the scope and application of the doctrine of *respondeat superior* beyond that traditionally applied to private employers simply because the Federal Government in its military capacity finds itself in the role of employer."

(*Chapin* v. *U.S.*, United States Court of Appeals, Ninth Circuit, June 30, 1958, Barnes, J.)

Hatch Act . . .
no job-splitting

Two Illinois residents have been involved in Hatch Act cases decided recently by the United States Civil Service Commission—one lost.

The loser was an accountant in the Illinois Highway Department who had run for a county political office. Illinois has both state and federally aided highways, and both are administered from the one state department. The accountant contended that the Hatch Act should not apply to him because he spent 90 per cent of his time on purely state-highway work and only 10 per cent on projects on which federal funds were expended. The applicability of the Hatch Act is based on the use of federal funds.

The Commission rejected this defense. It declared that it would not weigh the time an employee spent in work subject to the Act against work not so subject. If he does any work in a capacity subject to the Hatch Act, it said, he would be considered subject to it, unless a *de minimus* situation were reached.

(*Matter of Knies*, United States Civil Service Commission, Docket No. 224.)

A woman civil service employee of the Department of Health, Education and Welfare in Chicago did better. Her alleged violation of the Hatch Act was service as co-chairman of the Transportation Committee of the Chicago Host Committee during the 1956 Democratic National Convention. She proved to the Commission that the position had nothing to do with the Democratic Party, was civic rather than political and that some Republicans had served on the same committee.

(*Matter of Marcin*, United States Civil Service Commission, July 15, 1958, Federal Docket No. 1590.)

Juries . . .
right to examine

The trial judge cannot deprive counsel of the right to conduct the *voir dire* examination personally, the Supreme Court of Nebraska has decided.

Although the Court noted that the state's historical trial practice had always been to allow the parties to put questions on the *voir dire*, there was no previous decision squarely on the point. The Court indicated that the right to question prospective jurors is one that must be requested and is subject to the trial judge's reasonable limitations, such as to pertinency, but it was not necessary to spell out the limitations because the factual situation in the case showed a complete denial of the right. The judge had conducted the examination himself and permitted counsel to ask questions only through him.

There is a wide variation in the procedures employed in qualifying a jury and there is a division of authority on the question decided by the Court in this case. Where the method is prescribed by statute, courts have ruled that the statute governs. In most states, counsel conduct the *voir dire*, subject to bench rulings. But in some states, the judge conducts the qualification, maybe permitting counsel to ask some questions personally or by submission to him. This method has been advocated as the most expeditious.

The Court in this case based its ruling on the constitutional provision for jury trial, coupled with the legislative grant of peremptory challenges. It declared that a party could not exercise his challenges intelligently without the

right to question prospective jurors himself.

(*Oden* v. *Nebraska*, Supreme Court of Nebraska, May 31, 1958, Wenke, J., 90 N. W. 2d 356.)

Meanwhile the Court of Appeals for the Ninth Circuit has surveyed the law of the federal courts on the subject and has reaffirmed the position that a party or his attorney does not have a constitutional right personally to conduct the *voir dire*.

The federal method of jury selection is embodied in Rule 24(a) of the Federal Rules of Criminal Procedure and Rule 47(a) of the Federal Rules of Civil Procedure, both of which provide that the court may permit counsel to conduct the examination of prospective jurors or "may itself conduct the examination". In the case decided by the Ninth Circuit, a criminal case in which the defendant was convicted of the illegal sale of narcotics, the judge conducted the examination but had offered to ask the defendant's questions through himself. The defendant's counsel wanted to ask the questions himself. But later he told the judge that he had no more questions to suggest and, as a matter of fact, he did not use all his peremptories.

No constitutional right was violated by the refusal to permit personal questioning of the panel, the Court declared. The test under the due process clause, it continued, is whether the selection of the jury was fair so that an impartial jury was obtained. "We find the *voir dire* examination permitted and undertaken here by the trial judge was adequate and fair to insure the defendant the unbiased selection of an impartial jury to which he was entitled", the Court concluded.

The Court also considered and found wanting contentions of the defendant that the restriction on *voir dire* amounted to a denial of the defendant's constitutionally protected right to trial by an impartial jury because it was coupled with the refusal of the clerk to furnish the defendant with a list of jurors prior to trial and the use by the prosecutor of a sort of jury dope-book apparently prepared and kept up by the United States Attorney's office. The Court noted that 18 U.S.C.A. §3432 requires advance notice of the jury list only in certain types of cases, primarily treason and capital offenses, and that the defendant was not entitled to the list in this case. As to the jury book, it said the use by the prosecutor of a "black-list" of "sympathetic jurors" or a "white-list" of "hanging jurors" could not be considered error in itself. It would be only the use of the list in certain ways to gain a prejudicial advantage that would be considered error, the Court remarked, and it could find no such use in this case.

(*Hamer* v. *U.S.*, United States Court of Appeals, Ninth Circuit, August 26, 1958, Barnes, J.)

Labor Law . . . *state remedies*

Simply because a labor union's tortious act is also declared an unfair labor practice by the National Labor Relations Act does not deprive a state court of jurisdiction of an action to recover damages for the tort. This is the decision of the Supreme Court of Ohio, on the heels of the United States Supreme Court's decisions on May 26 in *United Automobile Workers* v. *Russell*, 356 U.S. 634, and *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

By so ruling the Court has reversed the dismissal of suits against an unincorporated union and five of its officials brought by a union-member foreman who sought damages on allegations that he was deprived of his employment by union activity. The complaint charged that the union started a strike against the plaintiff's employer for the sole purpose of coercing the employer to discharge him.

Turning down the argument of the union and its officers that the state court was without jurisdiction to award judgments, the Court declared that the National Labor Relations Board did not have exclusive jurisdiction simply because the union's activity was an unfair labor practice. "The federal act does not expressly or by implication deprive the plaintiff of his common-law right of action in tort for damages", the Court declared.

The Court had little trouble dismissing the claim that the plaintiff should first be required to exhaust remedies provided by the constitution and by-laws of the union. This would be requiring a vain thing, the Court stated, "especially since it has not been pleaded or established that the union has internal remedies available to the plaintiff".

(*Perko* v. *Local No. 207 of International Association of Bridge, Structural and Ornamental Iron Workers Union*, Supreme Court of Ohio, July 2, 1958, *per curiam*, 168 Ohio St. 161.)

Libel and Slander . . . *abused privilege*

Two West Virginia state legislators have had their libel judgments against the *Charleston Gazette* affirmed by the Supreme Court of Appeals of West Virginia.

The newspaper stated in an editorial that both legislators, who were also in the insurance business, had been allotted fire insurance policies on state property through the executive branch of the state. The amount of the premiums was stated. There was no doubt that this much of the editorial was true; the libel suit arose from and revolved around the insinuations that accompanied these factual statements.

The gist of the newspaper charge was that the insurance business was allotted to legislator-insurancemen for the purpose of "buying" their support for the state administration. Speaking of the legislators who got the insurance business, the editorial charged:

> . . . They are the Governor's marionettes on the Senate and House floors, and they jump when ordered to—like Kukla and Ollie of television fame.
>
> It's easy to see that they've sold their votes—sold out their constituents—for a price. They're more dedicated to their own creature comforts than to the comforts and welfare of the folks back home.

In affirming judgments of $5,000 and $8,000, the Court conceded, as did the plaintiffs, that the publication was qualifiedly privileged, but it held that the newspaper had lost the privilege because of the excesses, abuses and false imputations of the editorial. The Court

ruled that the trial judge did not err in instructing the jury that the "privilege has been abused and exceeded". The vehement and violent nature of the accusations, coupled with the absence of any substantial proof of them, fully supported the instruction, the Court declared.

The defendant also relied on a state constitutional provision that there may be no recovery for libel if the "matter charged as libelous is true and was published with good motives and for justifiable ends". But the Court ruled that a mere showing of the practice of awarding state insurance to legislators did not prove or even impliedly support the extreme statements made in the editorial and that the defendant's good-motives justification had not been proved.

(*England* v. *Daily Gazette Company* and *Bower* v. *Daily Gazette Company*, Supreme Court of Appeals of West Virginia, July 3, 1958, Given, J., 104 S.E. 2d 306 and 317.)

Segregation . . . *schools and pools*

> We say that the time has not yet come in these United States when an order of a federal court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.

Italicizing this sentence, the Court of Appeals for the Eighth Circuit reversed a district court order giving the Little Rock school board a two and one-half years' delay in putting its integration plan into effect. The Federal District Court for the Eastern District of Arkansas had based its suspension order on its "equitable discretion and good judgment so as to allow a breathing spell in Little Rock, while at the same time preserving educational standards at Central High School". 163 F. Supp. 13, 27-28.

While the Court recognized that considerable violence had resulted during the 1957-58 school year at Central High because of the presence of Negro students and that both federal and national guard troops had been used, it declared that those incidents, even though adversely affecting normal educational processes, "are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock". To hold otherwise, the Court stated, would be to withhold rights guaranteed by the Federal Constitution.

"The issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the federal court directing the board to proceed with its integration plan", the Court said. Giving its answer, the Court continued: "An affirmance of 'temporary delay' in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means."

The Court had a nice word for the school board's action in formulating and putting into effect an integration plan in the face of opposition from the Arkansas Governor, but it ventured that the board might have avoided some of the trouble it experienced last year had it sought injunctive help from the courts and had it exercised more rigid discipline at Central High.

Dissenting and emphasizing that the school board had acted in good faith in attempting integration, one judge thought the district judge's order was a wise exercise of judicial discretion that should not be disturbed.

(*Aaron* v. *Cooper*, United States Court of Appeals, Eighth Circuit, August 18, 1958, Matthes, J.)

(NOTE: On September 12, 1958, the Supreme Court of the United States, after having reconvened in a special term to hear appeals when the Eighth Circuit stayed its mandate for thirty days, affirmed the Eighth Circuit's decision, lifted the stay and ordered the Little Rock board's integration plan resumed. The Court had heard arguments on August 28 and September 11. It announced its judgment without delay in the view of the "imminent commencement of the new school year at the Central High School in Little Rock", and it said that an "expression of views supporting our judgment will be prepared and announced in due course".)

An indication of what the courts might say when and if some Southern states carry out plans to close and perhaps sell their public schools to avoid integration is given by the United States District Court for the Middle District of North Carolina. It has ruled that no obstacle stands in the way of the closing and sale of an all-white public swimming pool by Greensboro, North Carolina.

There is no doubt about the squareness with which the question was presented to the Court. It phrased it itself as: "Whether defendants may sell Lindley Park swimming pool for the sole purpose of avoiding the duty imposed upon them to permit use of the pool by both Negro and white citizens of Greensboro under like terms and conditions, and for the sole purpose of defeating the constitutional rights of plaintiffs. . . ."

Finding no statutory requirement that a city must construct or operate a swimming pool, the Court concluded that unless persons under the same circumstances and conditions are treated differently there can be no discrimination. "If the swimming pools are closed and sold", the Court declared, "the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone."

The city proposed a public sale and the Court said that it could not assume that the pool would be purchased "by white persons and operated for white persons only". But it deferred the entry of an order dismissing the plaintiffs' action until thirty days after the sale, giving the plaintiffs a chance in that time to show "that the sale was not bona fide in the sense that there was collusion between the defendants and the successful bidder regarding the future use of the pool".

(*Tonkins* v. *City of Greensboro*, United States District Court, Middle District of North Carolina, May 23, 1958, Stanley, J., 162 F. Supp. 549.)

Unauthorized Practice . . . *title companies*

The Supreme Court of Nevada has affirmed an unauthorized-practice-of-law injunction against a Las Vegas title insurance company, but has refused to enjoin the company from preparing purchase-and-sale agreements, escrow agreements and escrow instruc-

tions. Remaining proscribed are deeds, notes, chattel mortgages, trust deeds, assignments and bills of sale.

The fact-showing was that buyers and sellers were brought by the realtor to the title company and the purchase-and-sale agreement was then prepared by title company employees from the instructions furnished by the parties. There was no showing that this was done in any cases other than those in which the title company acted as escrow agent and insurer. The parties were advised that certain documents would be required to consummate the sale and that the title insurer would prepare them and have them checked by its attorney, unless the parties desired their own attorneys to perform those services. The parties would permit the company to prepare the documents and the company attorney to examine them. No separate charges were made for these services.

The Court thought that the drafting of the escrow instruments and the sale contracts were but routine, clerical acts, but, it continued: "The difficulty with the company's position is that its services did not end with the clerical preparation of the instruments by the escrow officer and the stenographer. It was the company itself which judged of the legal sufficiency of the instruments to accomplish the agreement of the parties."

The Court then went on to note that there was a complete lack of attorney-and-client relationship between either party to the transaction and the title company's attorney, whose concern with the legality of the instruments was from the point of view of the title insurer rather than of the parties. "Insurance may well be reassuring", the Court remarked, "but it is no complete substitute for legality." Passing judgment on the legal sufficiency of the instruments to accomplish the wishes of the parties is the practice of law, the Court declared, and not merely a clerical act.

The Court recognized that an apparent exception has been carved out by recent unauthorized practice cases in which lay companies have been permitted to perform legal services if in connection with a service legitimately offered by the lay organization or if in the public interest because of practical necessity. This case provided neither basis, the Court said.

(*Pioneer Title Insurance & Trust Company* v. *State Bar of Nevada*, Supreme Court of Nevada, June 6, 1958, Merrill, J., 326 P. 2d 408.)

Verdicts . . .
installment plan

What might be termed a "spendthrift verdict" has been approved by the Supreme Court of Oklahoma. The verdict: an award in a damage suit of $36,000 "to be paid at $150 per month for twenty years".

Neither party had objected to the verdict when it was returned and the trial judge discharged the jury. Later the defendant attacked it twice, with a denial of its motion each time. But the trial judge did strike out the words referring to the method of payment as surplusage.

With this the Oklahoma Court did not agree. It pointed out that the verdict was not invalid, although it was neither suggested nor authorized by the instructions and should not have been returned or received in that form. Since it was received without objection in that form, however, the Court continued, it should not be struck down later. The Court declared that courts cannot change a verdict after a jury has been discharged.

The Court reinstated the verdict in its original form, with each monthly installment to draw interest from its due date.

(*M & P Stores, Inc.* v. *Taylor*, Supreme Court of Oklahoma, May 13, 1958, Corn, J., 326 P. 2d 804.)

What's Happened Since . . .

On June 30, 1958, the Supreme Court of the United States:

AFFIRMED (unanimously) the decision of the New York Court of Appeals in *Lerner* v. *Casey*, 2 N.Y. 2d 355, 141 N.E. 2d 533 (43 A.B.A.J. 447; May, 1957), that no constitutional rights of a municipally employed subway conductor were violated by his suspension under the New York Security Risk Law for refusing to answer questions as to whether he was a member of the Communist Party, the refusal being grounded on the Fifth Amendment privilege against self-incrimination.

DISMISSED APPEAL in *Atkinson* v. *Superior Court*, 316 P. 2d 960 (44 A.B.A.J. 171; February, 1958), leaving in effect the decision of the Supreme Court of California that a California court had jurisdiction to grant musicians an injunction to prevent a trustee's holding the musicians' royalties from using them for certain purposes, although personal service on the trustee in California had not been obtained. In the United States Supreme Court the case was styled *Columbia Broadcasting System* v. *Atkinson*.

Activities of Sections

SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW

The twenty-fifth Annual Meeting of the Section of Insurance, Negligence and Compensation Law was held at The Ambassador Hotel in Los Angeles with Section Chairman L. J. Carey, of Detroit, presiding.

With more than one thousand members of the Section and their guests attending, the meeting was considered singularly successful and interesting.

All committees within the Section were represented on the program—either on an individual basis or participating with other committees.

Of particular significance to the operation of the Section for the coming years was the appointment this year by Chairman Carey of a "Committee on Committees"— the purpose of which was to study committee organization, function and purpose, membership and accomplishments. Recommendations of the committee, which will be announced subsequently, would tend to make committee activities broader and more attractive to present and prospective Section members. Stanley C. Morris, of Charleston, West Virginia, who has succeeded Mr. Carey as Section Chairman, stated that the Committee will continue its study.

Highlights of the meeting included a panel discussion on the afternoon of August 25; the subject being "Compensation Regardless of Fault". Wyatt Jacobs, of Chicago, a member of the Council, introduced the Automobile Committee Chairman, George E. Allen, of Richmond, who presided. Speakers were P. L. Thornbury, of Columbus, Ohio, Leo S. Karlin, of Chicago, Edward P. Gallagher, of Indianapolis, and George M. Schlotthauer, of Madison, Wisconsin. Public interest in this subject is obvious and a full house listened to the opinions of these speakers.

George Murphy, spokesman for the motion picture industry, was the speaker at the Section's Annual Luncheon. Mr. Murphy contended that all persons should recognize the need for highest moral standards in the performance of their professional and civic duties and responsibilities. He pointed out that all citizens have a stake in the conduct of business, professional and governmental affairs. Individual awareness of this is a requisite as our society becomes more complex and as interdependence among peoples of all nations is of greater importance.

All of August 25 was devoted to the Legal-Insurance Aspects of Atomic Energy. This is the first time such a program has been presented. Among the prominent speakers were F. Britton McConnell, Insurance Commissioner of California, A. W. Murphy, of New York, Edmund D. Leonard and Dr. L. H. Garland, of San Francisco, Dean E. Blythe Stason, of Ann Arbor, and George Gore, of Hawthorne, California.

A panel, moderated by James B. Donovan, of New York, followed on "The Impact of the Atom on Property and Marine Insurance". Speakers were Ambrose B. Kelly, of Providence, J. Raymond Berry, of New York, and Louis W. Niggeman, of San Francisco.

The dinner-dance that evening was an outstanding success with Gordon H. Snow, of Los Angeles, as Chairman of Arrangements. More than seven hundred and fifty members and their guests were present in the Embassy Room of The Ambassador.

Charles E. Pledger, Jr., of Washington, presided on the morning of August 28 when his Committee on Trial Tactics presented: "Whiplash Injuries, the Legal and Medical Aspects". The moderator was Judge Clarence B. Runkle, of Los Angeles; speakers were John Lewis King, of San Bernardino, and Dr. Harold E. Crowe, of Los Angeles.

Kenneth Martin Worthy's paper on "Federal Taxation and Life Insurance" was presented by the Life Committee.

The concluding address by Sir William Charles Crocker was interesting and especially entertaining. Sir William Charles, former President of the Law Society of England, was introduced to a capacity audience by L. Duncan Lloyd, of Chicago.

The 1958-1959 Section officers are Stanley C. Morris, of Charleston, West Virginia, Chairman; John J. Wicker, Jr., Richmond, Chairman-Elect; Welcome D. Pierson, Oklahoma City, Vice Chairman, and Robert P. Hobson, Louisville, Secretary. (Because of other American Bar Association commitments, Mr. Hobson resigned and Lowell D. Snorf, Jr., of Chicago, was elected to succeed him.) New council members are John R. Dixon, of St. Louis, and C. C. Fraizer, of Lincoln, Nebraska, and George E. Beechwood, of Philadelphia, who was re-elected Section Delegate to the House.

SECTION OF JUDICIAL ADMINISTRATION

The Annual Meeting in Los Angeles marked the completion of an outstandingly successful year for the Section. Under the chairmanship of Mr. Justice Clark, membership grew almost to the two thousand mark, and the Section participated in every American Bar Association Regional Meeting with programs of national interest.

At Los Angeles the Chief Justices of the states were guests of honor on an ocean cruise aboard a private yacht. The Section's annual luncheon in honor of state and federal judges and the annual dinner in honor of the judiciary taxed the respective capacities of the Biltmore and Statler, and the ticket supply for each event was exhausted much earlier than expected. Mr. Justice Brennan spoke informally at the luncheon and J. Edgar Hoover keynoted the Law and Laymen Program which followed. At the Annual Dinner, which was attended by a long list of luminaries headed by the Chief Justice of the United States, the speakers were the Attorney General of the United States and Chief Justice John R. Dethmers of the Supreme Court of Michigan, Chairman of the Conference of Chief Justices. A highlight of the

dinner was the presentation of a handsome scroll to Mr. Justice Clark in recognition of his great contribution to the Section during the past year.

Other events included the jointly sponsored National Traffic Program, luncheon and reception keynoted by Robert Young of movie and T.V. fame, addressed by T. S. Petersen, President of Standard Oil of California. Also, either given by the Section or jointly sponsored were panels on Uniform Rules of Evidence and Tasks of the Trial Judge.

At the Section meeting Chief Judge Emory H. Niles of the Supreme Bench of Baltimore City was elected Chairman to succeed Mr. Justice Clark, and it was announced that Mr. Justice Clark had agreed to continue his active interest in the work of the Section as Co-ordinator of the State Committees. Following the election of officers there was an instructive and thought-provoking outline of the work now being done in North Carolina looking toward a complete revision of the entire judicial system of the state, the surveys for which have been conducted by the University of North Carolina's Institute of Government.

The Section is now making plans for another year of progress in carrying out its primary objective—the improvement of the administration of justice both in the states and in the federal system, through the active interest and participation of judges, lawyers and laymen.

SECTION OF TAXATION

Under the leadership of Chairman Lee I. Park, of Washington, D.C., the Annual Meeting of the Section of Taxation (which has now reached a membership of over 7,200), was held in Los Angeles, August 23 through 26.

After meetings of the officers and Council on August 21, and of the Council and Committee Chairmen on August 22, three days were devoted primarily to committee reports and proposed legislation. The printed Annual Program (which ran to approximately 325 pages), in addition to detailing the proposed legislative recommendations and summarizing other committee activities, contained digests of important new cases, rulings and regulations in the field of taxation.

The Section adopted recommendations of its Council to amend the Section By-Laws with respect to dues and for legislation to restore the Chief Counsel of the Internal Revenue Service to his former position as a statutory officer appointed by the President and confirmed by the Senate. Both of these recommendations were adopted by the House of Delegates of the Association. Twenty-three recommendations for legislation, proposed by committees of the Section, were adopted by the Section and received the approval of the House of Delegates. These legislative recommendations will be transmitted to the appropriate committees of Congress during the next session. A legislative proposal of the Exempt Organizations Committee of the Section, pertaining to the deductibility of patronage dividends by a co-operative and their taxability to the patrons, was adopted by the Section by a close vote after heated debate, but was subsequently tabled by the House of Delegates.

At a luncheon session on August 24, an address was delivered by William J. Jameson, United States District Judge for the District of Montana, a former President of the American Bar Association, on "The Relationship of Lawyers and Certified Public Accountants in Federal Tax Practice under the Draft of the Code of Conduct". Judge Jameson's remarks will be published in a later issue of the AMERICAN BAR ASSOCIATION JOURNAL.

At one of the business sessions, Arch M. Cantrall, Chief Counsel of the Internal Revenue Service, informally addressed the Section with respect to current developments relating to the operation of the Chief Counsel's office. Mr. Cantrall's remarks will be published in the next issue of the *Section of Taxation Bulletin.*

A technical session was held on the morning of August 26 on "The Tax Problems of the Independent Motion Picture and Television Producer". The program was introduced by Arthur B. Willis, of Los Angeles. A well-known star of the entertainment field, Desi Arnaz, appeared in the role of a producer who with his regular attorney, played by Harold D. Berkowitz, consulted two tax attorneys, Lawrence Irell and Arthur Manella, who presided at the tax conference.

A special session on state and local taxes was held during the afternoon of August 26. Presented were: (1) a report of the Subcommittee on Simplification of Multi-State Income Taxation; (2) a report on Severance Taxes, with Special Emphasis on Off-shore Oil and Gas Production, by Dr. Arthur Lynn, Department of Economics, Ohio State University; and (3) a two-part discussion and debate on the subject "Does the Tax Structure of a State Appreciably Influence the Location of New Industries", by James H. Maloon and George D. Brabson.

The Committees on Corporate Stockholder Relationships, Income Taxation of Estates and Trusts, and Taxation of Partnerships, distributed comprehensive analyses of the reports of the Advisory Groups to the House of Representatives' Ways and Means Committee on Subchapters C, J and K of the Internal Revenue Code of 1954. Copies of these comments may be obtained, upon request, from the Washington office of the Tax Section.

The Section elected the following officers for the current year: Lee I. Park, of Washington, D. C., Chairman; William R. Spofford, of Philadelphia, Vice Chairman; and Hover T. Lentz, of Denver, Secretary.

The following were elected as Council members for three-year terms: Edwin S. Cohen, of New York City; Austin H. Peck, Jr., of Los Angeles; and Andrew B. Young, of Philadelphia. David W. Richmond, of Washington, D. C., was elected Section Delegate to the House of Delegates.

OUR YOUNGER LAWYERS

Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor

Come to Chicago!

Calling all J.B.C.-ers. If you would like to meet the gay and capable legal gentlemen who are guiding the fortunes of the American Bar Association's Junior Bar Conference during 1958-1959 (and pictured below), come to Chicago, February 20-22. The occasion is a meeting of Junior Bar representatives from the Sixth, Seventh and Eighth Circuits, scheduled in conjunction with the American Bar Association-Junior Bar Conference Midyear Meeting.

All lawyers are welcome. The larger the attendance, the more pleasant and educational the meeting. For information, write Charles O. Brizius, Conference Administrative Assistant, 1155 E. 60th Street, Chicago 37, Illinois.

New Junior Bar Conference Officers

Since their election at the Annual Meeting, the new Conference officers have been happily expediting the Junior Bar Conference's business. Kirk M. McAlpin, of Savannah, is Chairman, while Gibson Gayle, Jr., of Houston, is serving as Vice Chairman and William Reece Smith, Jr., of Tampa, is Secretary. Assisting the officers are four Directors—James M. Ballengee, of Philadelphia, James J. Bierbower, of Washington, D.C., Kenneth J. Burns, Jr., of Chicago, and Bryce M. Fisher, of Cedar Rapids, Iowa.

The officers and directors will met on October 3 and 4, in Portland, Maine, to further Conference plans for the year 1958-1959. This Directors' meeting will coincide with the American Bar Association's Northeast Regional Meeting and a gathering of Junior Bar representatives from the First, Second and Third Circuits. This October session provides a splendid forum for an exchange of ideas and a discussion of successful projects or activities recently undertaken by younger lawyers' groups from Maine to Pennsylvania.

Nine New Councilmen Added

The Junior Bar Executive Council for 1958-1959 includes the following (in addition to the officers and Conference Delegate to the American Bar Association House of Delegates, Bert H. Early, of Huntington, West Virginia):

Donald J. Evans, of Boston, Massachusetts, First Circuit; Carl W. Nielsen, of Hartford, Connecticut, Second Circuit; Paul L. Jaffe, of Philadelphia, Pennsylvania, Third Circuit; Walter R. Tabler, of Baltimore, Maryland, Fourth Circuit; J. Rex Farrior, Jr., of Tampa, Florida, Fifth Circuit; Richard H. Allen, of Memphis, Tennessee, Sixth Circuit; John S. Rendleman, of Carbondale, Illinois, Seventh Circuit; C. Paul Jones, of Minneapolis, Minnesota, Eighth Circuit; Calvin H. Udall, of Phoenix, Arizona, Ninth Circuit; Robert B. Keating, of Denver, Colorado, Tenth Circuit; Lewis A. Dysart, of Kansas City, Missouri, at Large Fifth and Eighth Circuits; Richard D. Barger, of Los Angeles, at Large Ninth and Tenth Circuits; and James R. Stoner, of Washington, D.C., District of Columbia Circuit.

Messrs. Nielsen, Tabler, Allen, Jones, Keating and Barger were elected at the Annual Meeting. Messrs. Farrior, Rendleman and Dysart were designated by the Executive Council to fill vacancies.

The new Executive Council held its initial 1958-1959 meeting on August 26 at Los Angeles and will convene for its regular midyear session at Chicago on February 21 and 22.

Annual Meeting Recap

Bouquets for our hosts. For those of us fortunate enough to have been in attendance at the American Bar Association Junior Bar Conference Annual Meeting in Los Angeles last August, a special "thank you" must be said for the wonderful California hospitality arranged by Annual Meeting Committee Chairman Richard F. Alden and his host group. Especially unforgettable was the dinner-dance held at the beautiful Beverly Hilton.

The Junior Bar Conference Annual Meeting marked the initiation of Conference activity under its newly adopted reorganization plan. The highlight

Active young lawyers on the Executive Council of the Junior Bar Conference, include (seated) William Reece Smith, Jr., Kirk M. McAlpin, Gibson Gayle Jr.; (standing) Kenneth J. Burns Jr., Lewis A. Dysart, John G. Weinmann, C. Paul Jones, James R. Stoner, Richards Barger, J. Rex Farrior, James J. Bierbower, Donald J. Evans, Carl W. Nielsen, Walter R. Tabler, John S. Rendleman, and Richard H. Allen.

of the new Junior Bar Conference format was the convening of the first session of the Conference Assembly, composed of delegates from all Junior Bar Conference affiliated Junior Bar groups.

Robert R. Richardson, of Atlanta, Georgia, was elected speaker, while John G. Weinmann, of New Orleans, Louisiana, was named clerk. The Assembly adopted rules for Conference procedure and approved basic policy matters.

A splendid delegates' workshop was also presented under the direction of C. Cullen Smith, of Waco, Texas, for the benefit of the Conference Assembly.

The traditional debate, sponsored by the Conference on Personal Finance Law, was held on August 25. The topic concerned the legality of interest charges under revolving credit plans. The winners were James M. Ballengee, of Philadelphia, Pennsylvania, and James J. Bierbower, of Washington, D.C.; Robert H. Geffs, of Janesville, Wisconsin, and Edward E. Murphy Jr., of St. Louis, Missouri, also participated.

Among those elected as Assembly Delegates to the American Bar Association House of Delegates were two very able past-chairmen of the Conference, C. Baxter Jones, Jr., of Atlanta (Chairman in 1954), and William C. Farrer, of Los Angeles (Chairman in 1957).

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The following article calls attention to the probability that artificially stimulated letter campaigns are subject to the Federal Regulation of Lobbying Act. The author is Professor of Law in the University of California at Berkeley and is widely known as a student and writer in the fields of legislation and administrative law.

Lobbyists' Letters

by Frank C. Newman

The Federal Regulation of Lobbying Act does not proscribe lobbying, but it does require that lobbyists' expenditures and certain related facts be disclosed.[1] Its constitutionality was upheld and crucial ambiguities were resolved by the Supreme Court in 1954 in *United States* v. *Harriss*.[2] The Department of Justice has evidenced no intent to enforce the statute aggressively,[3] but published reports show that many groups and individuals are making a conscientious effort to comply.[4]

Unfortunately, there is reason to believe that on one point, at least, some people are being given incorrect legal advice. In the *Harriss* case Chief Justice Warren stated that there were three prerequisites to coverage under the Act:

> (1) the "person" must have solicited, collected, or received contributions;
> (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress;
> (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress.[5]

He further declared that "to influence . . . legislation" should be construed to mean " 'lobbying in its commonly accepted sense'—[that is,] . . . direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the act makes clear, that, at the very least, Congress sought disclosures of such direct pressures, exerted by the lobbyists themselves or through their hirelings *or through an artificially stimulated letter campaign.*" [6]

It now appears that those last seven words, dealing with lobbyist-sponsored letters to Congressmen, are sometimes overlooked. In the February 7 issue of the 1958 *Congressional Quarterly Weekly Report*, for instance, the editors state: "*U.S.* v. *Harriss* . . . in effect limited the lobby law's applicability to 'direct communication with members of Congress'. This presumably means that a group need not report money it spends to generate a letter writing campaign for or against a bill before Congress [page 151]." Similarly, the *Wall Street Journal* for March 12, 1956, declared: "The Supreme Court . . . ruled that lobbying must include direct communication with Congress. It excluded such indirect action as merely urging voters to write their lawmakers [page 12]." Also, there are several respected sources where, by omission of any reference to "artificially stimulated letter campaign", the reader is encouraged to infer that the act would not be applicable to such a campaign.[7]

The Court's language was not equivocal. If the spender is otherwise covered by the act, it seems clear that his expenditures for artificially stimulated letter campaigns ought to be reported; and this interpretation of the *Harriss* case is endorsed by many authorities.[8] We have often been reminded of the impact on legislation of letters to Congressmen from constituents and

1. 2 U.S.C. §§ 261-270 (1946).
2. 347 U.S. 612 (1954).
3. See S. Rep. No. 395, 85th Cong., 1st Sess. (1957) page 66; *cf.* Newman and Surrey on Legislation (1955) page 55.
4. *E.g.*, see "Lobbies Report Spending Over $1 Million in 1958", 16 Cong. Q. Weekly Rep. 607 (1958).
5. 347 U.S. at 623.
6. *Id.* 620 (italics added). He quoted the following from the 1946 Senate and House reports: "[The Act applies] . . . chiefly to three distinct classes of so-called lobbyists: First. Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams. . . . *Id.* note 10.
7. *E.g.*, see Speech of the Associate General Counsel of the U.S. Chamber of Commerce at the Chicago Conference on Association Activities and the Law, May 23, 1956, page 5 (mimeo); Blaisdell, *Lobbying Evils Baffle Congress*, Washington Post, November 11, 1956, page E3; Notes, 98 L. ed. 1006, 1007 (1954); 39 Minn. L. Rev. 214, 217 (1955); *cf.* Everberg, *The Law of Lobbying*, 62 Commercial L. J. 68, 70 (1957).
8. *E.g.*, see 16 N. A. M. Law Dig. 17, 19 (1954) ("it would appear that the Court considers a 'stimulated letter campaign' to be the equivalent of 'direct lobbying' "); Lamb and Kittelle, Trade Association Law and Practice (1956) page 157; Kennedy, *Congressional Lobbies: A Chronic Problem Re-examined*, 45 Geo. L. J. 535, 554 (1957); Note, 49 Nw. L. Rev. 807, 810 (1955).

others.[9] When those letters are artificially stimulated and are the product of a lobbyist's campaign, is there any reason in law or policy why their cost should not be disclosed, along with other lobbying costs?

There will be borderline cases, of course, where attorneys may have to speculate as to whether a particular campaign for letters was artificially stimulated. Regarding requests that the readers write to his Congressman which are stated in serial publications, there may be doubts as to whether particular publications are exempted from the act as "regularly published periodicals".[10] It may be that amendments are needed to clarify those and other ambiguities, and statutory language to articulate the desired goals exactly is not easily drafted.[11] Nonetheless, most lobbyists should not have difficulty in categorizing most of their letter campaigns, and it is to be hoped that misreadings of the Chief Justice's *Harriss* opinion will not result in illegal failures to disclose the required data.

9. *E.g.*, see Sell, "Lobbying: An Institution in the Legislative Process", 42 A.B.A.J. 356 (1956); La Roe, *The Other Side of Lobbying*, 23 ICC P.J. 771, 773 (1956); S. Rep. No. 395, *supra* note 2, at 65. For recent illustrations of artificially stimulated letter campaigns, see Charles S. Rhyne, letter to Bar Officials regarding S. 420 and H.R. 3813, June 25, 1958; broadside letter regarding H.R. 11470 from American Bar Association Special Committee on Lawyers in the Armed Services, April 18, 1958. Also see *Oil Company Pressures*, 15 Cong. Q. Weekly Rep. 317 (1957); *Ghosts All*, The Reporter, June 16, 1955, page 3.

10. *Cf.* Newman and Surrey on Legislation (1955) page 59. For an illustration of a letter campaign in a regularly published periodical, see 1 Am. Bar News No. 6, page 3 (December 15, 1956); *cf.* 4 ABA Coordinator No. 18, page 1 (December 1, 1956); CIO News, June 20, 1955, page 7.

11. See Lyon and Stanhagen, *Lobbying, Liberty, and the Legislative Process: An Appraisal of the Proposed Legislative Activities Disclosure Act*, 26 Geo. Wash. L. Rev. 391, 408 (1958).

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth Liles, Chairman

The Stripper's Right to Depletion

By Lipman Redman, Washington, D. C.

For those of you who have come this far because of the title, let me now hasten to say that our "stripper" is a strip miner of coal: one who engages in the business of mining coal by removing the overlying earth—or overburden—where the coal lies sufficiently close to the surface of the earth to make it more economical to extract it by stripping than by deep mining methods. The strip miner is having his problems: the coal company-land owner for whom and on whose land the stripping is done, and the Government (in some instances anyway) are disputing his right to a share of the deduction for depletion. Although these problems are considerably less dramatic than the usual depletion issues which rate newspaper treatment (the political and ideological questions of which industries and groups rate "specialized" or "preferential" treatment), since they are now the subject of petitions for certiorari to the Supreme Court, they appear to warrant discussion here.

The business of strip mining has developed into a significant segment of the coal industry. Specific strip mining projects frequently call for the stripping of coal from large areas requiring several years, by the use of increasingly large and expensive equipment (such as a dragline which can cost as much as $240,000 and stand as high as an eight-story building). In many instances, the owner of the property supplies only the land, some maps and geological surveys; the stripper takes over from there. He supplies his own men, materials and equipment; he pays all expenses of the operation, including insurance and local taxes of all kinds; he builds all necessary roads and makes other improvements required to proceed with the mining. In a word: the stripper moves his own organization in and proceeds with the project. In some cases the property owner, who is also a coal company, undertakes some of these responsibilities, such as having its superintendent inspect the stripper's equipment and stripping methods and approve the rate of operation, the particular direction on the tract in which the work is to proceed, and so on. But basically, the work is done by the stripper at his own risk, perhaps under some degree of supervision by the coal company-land owner.

In these circumstances there is no dispute over the basic fact that income earned in the mining process is subject to the depletion allowance. The question is: who is to share in the deduction? If coal is sold for, say, $3.50 per ton, does that full amount represent the income from mining of the land owner, or if the land owner has paid the stripper, say, $2.50 of that amount, does that $2.50 represent the stripper's income from mining and therefore subject to his own deduction for depletion, leaving to the land owner only the remaining $1.00 as his income from mining and confining his depletion deduction to that amount?

As matters developed, it soon became reasonably clear that the strip miner was entitled to share in the depletion deduction where he had the exclusive right to mine a designated area to exhaustion. *Eastern Coal Corp.* v. *Yoke*, 67 F. Supp. 166 (N.D.W.Va. 1946). Under those circumstances, it was felt that the stripper had the required "economic interest in the mineral in place", the concept which the Supreme Court long ago established as the *sine qua non* for depletion. *Palmer* v. *Bender*, 287 U.S. 551 (1933). That case established two requirements for the all-important economic interest: first that the taxpayer have "acquired by investment, any interest in the oil in place"; and second that the taxpayer's income must come "from the extraction of the oil, to which he must look for a return of his capital". Among the more familiar of the whole host of cases which followed are *Burton-Sutton Oil Co., Inc.* v. *Commissioner*, 328 U.S.

25 (1946); *Kirby Petroleum Company* v. *Commissioner*, 326 U.S. 599 (1946); and most recently, *Commissioner* v. *Southwest Exploration Company*, 350 U.S. 308 (1956).

As strip mining developed and as the general concept of depletion expanded, the stripper's efforts to secure some of the tax benefits attracted the attention of the Internal Revenue Service as an industry-wide matter. This culminated in the issuance of G.C.M. 26,290, 1950-1 C.B. 42. Although the G.C.M. contained a careful and thorough analysis of the entire situation, it started the ball rolling along two lines of litigation, both of which have now joined in two cases which are the subject of petitions for certiorari.

The Need for the Stripper's Reliance on Sale

One of these lines stemmed from the phrase "extraction and sale" in that part of the basic rule that says the taxpayer must look to the extraction of the mineral in place as his sole source of return. The two words "and sale" seem to have crept in, possibly even accidentally, as descriptive of the fact that in most instances in the oil business, the mineral was in fact sold and the particular taxpayer involved was in fact paid out of the proceeds of sale. But whatever the origin of those two words, technical advisers in the Appellate Division and Service lawyers in the various regional offices hung their hats on these words and disallowed depletion where the stripper was paid a fixed price, rather than a percentage of the price at which the coal company sold the coal. In effect, this meant that in addition to assuming the risks involved in the discovery and extraction of coal, the stripper had to assume also the risks of the coal market and the sale of the coal before he could participate in the depletion deduction.

It is the opinion of the author that there is no basis for having the existence or non-existence of an economic interest in coal in place hinge on a question involving the status of the coal market at a particular time, or on a question of salesmanship having nothing whatsoever to do with mining. The existence in the first instance of an economic interest in coal in place should in no way depend upon whether the stripper's economic interest in the coal *continues after* it has been discovered and mined and turned over to the coal company for sale.

Nevertheless, the Tax Court denied depletion to strip miners in such cases as *Morrisdale Coal Mining Company*, 19 T.C. 208 (1952), where the stripper was paid a fixed price per ton of coal mined and delivered, but allowed depletion in such cases as *James Ruston*, 19 T.C. 284 (1952), where the stripper had basically the same rights except that he was paid a percentage of the sales price of the coal. Fortunately for strippers, when this issue first hit the appellate courts, the answer was favorable to their cause. *Commissioner* v. *Gregory Run Coal Co.*, 212 F. 2d 52 (4th Cir. 1954), reversed the Tax Court, in cases where both stripper and coal company were involved and the Government, having to make a substantive choice while taking both sides procedurally for purposes of protecting the revenue, sided with the stripper. The Government stuck to that position in *Commissioner* v. *The Mammoth Coal Co.*, 229 F. 2d 535, 538 (3d Cir. 1955), wherein that court said:

> The fact that . . . the stripper received so much per ton should make no difference, for in any event the stripper had to look to the coal which it mined for return of its investment and profit.

Unfortunately for strippers, this did not satisfy the Tax Court but once again the Fourth Circuit set things right for them. It reversed the Tax Court in *Weirton Ice & Coal Co.* v. *Commissioner*, 231 F. 2d 531 (4th Cir. 1956), and in *Hamill Coal Corp.* v. *Commissioner*, 239 F. 2d 347 (4th Cir. 1956), and again held that a strip miner who otherwise is entitled to depletion, does not lose that right because of the manner in which his income is computed.

But then the Tax Court's approach was adopted by a district court in two recent cases: *Parsons* v. *Smith*, 57-2 U.S.T.C. ¶9715; and *Huss* v. *Smith*, 150 F. Supp. 224 (E.D. Pa. 1957). On appeal, despite its earlier opinion in *Mammoth* that the method of payment was insignificant, the Third Circuit affirmed, with the observation that "the courts characteristically look at the entire context in deciding whether mining contractors have depletable interests in the mineral in place". *Parsons* v. *Smith*, 58-1 U.S.T.C. ¶9390 (3d Cir. 1958). This, despite the fact that the Government in effect had abandoned in its brief the argument that method of payment is important[1] and despite the pointed remark by the dissenting judge on the motion for rehearing in *Huss et al.* v. *Smith*, 58-2 U.S.T.C. ¶9579 (3d Cir. 1958):

> Until now, every appellate decision in this type of case, including our own decision in *Commissioner* v. *Mammoth Coal Co., supra*, has held that there is no requirement that the stripper must assume the risks of the ultimate market. To the extent that we now hold otherwise, we are in conflict with our decision in that case and with the decisions of the Fourth Circuit.[2]

This conflict is one of the main points in the presently pending petitions for certiorari.

Some paragraphs ago we started on the trail of one of the two lines of litigation that began with G.C.M. 26,290, namely, the G.C.M.'s troublesome "and sale" proviso. The other trail concerns that portion of the G.C.M. setting up a new requirement dealing with terminability.

The Significance of Terminability of the Stripping Contract

The argument here is that where the coal company has reserved the right to terminate without cause and with no more than a brief period of notice (thirty days in *Huss*):

1. Government brief in *Parsons*, page 18: "When an agreement defines a particular area in which a strip miner is to work and grants to him the exclusive right to mine that area until the mineral supply is exhausted, and provides that all coal mined is to be delivered to the land owner in return for a stated amount per ton delivered, it is our position that the miner's relationship with the mineral in place is such as to entitle him to an allowance for depletion; the existence of his interest is coterminous with the existence of the mineral deposit and as each ton of coal is extracted that interest necessarily becomes less valuable."

2. The only other appellate court decision on the question is *Usibelli* v. *Commissioner*, 229 F. 2d 539 (9th Cir. 1955), which denied depletion to a stripper whose contract (with the U.S. Army) paid him a fixed price per ton. The Fourth Circuit in *Weirton, supra*, distinguished *Usibelli* on various grounds which appear valid to the author. If this distinction is not valid, *Usibelli* might be considered as supporting the Third Circuit decisions in *Parsons* and *Huss* and in conflict with the various Fourth Circuit decisions.

> The interest acquired by the miner . . . is not coterminous with the existence of the mineral asset; the interest of the miner does not diminish in value with the extraction of the mineral. Instead, whatever interest the miner has depends entirely upon the whim of the owner, who, without cause, can determine that someone else should mine the property, discharge the original miner and thus completely disassociate him from the property and the mineral. The miner whose privilege of mining can be terminated at the will of the owner is essentially in the position of an employee who acquires no real interest in the mineral whatever. A relationship which is so ephemeral certainly cannot be considered to be anything more than a "mere economic advantage" on which no depletion is allowable [page 21, Government brief in *Huss* in Third Circuit].

This was the contention which the Third Circuit adopted in *Parsons* and *Huss*. The contrary position, previously adopted by the Fourth Circuit in *Weirton, Hamill,* and *Gregory Run*,[3] is to the effect that, as that court stated in *Weirton* (231 F. 2d at 535):

> It is of no moment that the owner of the mineral, as in other cases in which the right of an extractor to a deduction for depletion has been upheld, had the option to terminate the arrangement at any time, for as the event proved Weirton actually mined the coal during all of the taxable years.

This was the conclusion also of the dissenting circuit court judge on rehearing in *Parsons* and *Huss*. The author is of the opinion that this is the only sound position. The contract power to terminate the stripper's economic interest has nothing to do with the existence of that right in the first instance. The power of termination is relevant only if it is actually exercised and then only because it may affect gross income from mining which thus in turn affects the amount of depletion allowance. But these quantitative considerations are of no greater moment here, in relation to the basic question of the *right* to depletion, than are such things as the cost and life of an asset in relation to the existence of the *right* to (as opposed to the amount of) depreciation. Obviously, the lower the cost and the longer the life of an asset, the smaller the amount of the annual deduction for depreciation. But the *right* to any deduction at all exists even if the asset costs $10.00 and has a life of ten years. So here: the cancellation of a contract or the reduction of the tonnage to be mined may reduce the amount of the income from mining and therefore necessarily the amount of the deduction for depletion. But these *quantitative* considerations have no other relevance. They should not affect the basic, initial question of whether there is an economic interest to start with.

These are two of the main issues presented in the petitions for certiorari in *Parsons* and *Huss*.[4] On these points the Third Circuit appears to be in conflict with its own earlier decision in *Mammoth* and with the Fourth Circuit in the three cited cases. Apparently agreeing that the latter conflict does exist, the Government on September 16 filed a memorandum with the Supreme Court agreeing that certiorari should be granted. It is now likely that the Supreme Court will agree to hear the cases. This would be helpful in establishing some necessary guides in this confusing area. In any event, strippers should know more about their tax position within the next several months.

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3. In a fourth case, *Stilwell* v. *U.S.*, 250 F. 2d 736 (4th Cir. 1957), after citing with approval its three earlier decisions listed above, the Fourth Circuit held that there was no right of termination, but then went on, unnecessarily, to use language—in one sentence—which could indicate some confusion as to the significance of terminability. The Third Circuit in *Parsons* and *Huss* made no point of this and in fact included *Stilwell* in the same category with the other three Fourth Circuit decisions which the Third Circuit described as "recent borderline cases".

4. A third point concerns the type of "capital investment" required in the mineral in place to support the depletion deduction. It was always assumed that the quoted words were synonymous with "economic interest"; the "investment" to be recovered is the taxpayer's economic interest in the coal in place and to be extracted. Were this not so and if the law required a cash outlay for the purchase of "something depletable", no stripper would ever have the kind of investment which would support the depletion allowance. As the Supreme Court said in the *Southwest Exploration Company* case (350 U.S. at 312), depletion "continues so long as minerals are extracted, and even though no money was actually invested in the deposit". Nonetheless, in both *Parsons* and *Huss*, the Third Circuit appears to have adopted the concept that the "capital investment" had to take the form of a specific cash outlay or specific machinery and the like.

The Federal Register Is Important To Lawyers

We have received a letter from B. R. Kennedy, Director of the Federal Register Division of the National Archives and Records Service, calling attention to the fact that many lawyers are apparently unaware of the existence of the *Federal Register* and its importance to members of the legal profession.

The *Federal Register* publishes daily the full text of Presidential proclamations and executive orders, and any other order, regulation, notice, or similar document promulgated by the federal administrative agencies that has general applicability and legal effect. The contents of the *Federal Register* are required by law to be judicially noticed (see *Federal Crop Insurance Corporation* v. *Merrill*, 332 U. S. 380.)

Subscriptions are $15 annually, $1.50 monthly, and should be sent to the Superintendent of Documents, Government Printing Office, Washington, D. C.

A sample copy of the *Federal Register* will be sent upon request to the Director, Federal Register Division, Washington 25, D. C.

BAR ACTIVITIES

Leo D. Heck

The Bar of the State of South Dakota was first organized at a meeting held in Sioux Falls on December 7, 1897. The stimulus for the organization was provided by the Minnehaha County Bar Association which had organized in February of that year, after some previous unsuccessful attempts to perfect an organization. The first meeting was called to order by H. H. Keith, Chairman of the Executive Committee of the Minnehaha County Bar Association, and the records disclose that R. J. Gamble was elected chairman of the meeting, with John Voorhees, of Sioux Falls, as Secretary. The association was formed on a strictly voluntary basis and seventy-eight members from various parts of the state subscribed to the constitution and by-laws, after which Bartlett Tripp was elected President and John Voorhees permanent Secretary. Mr. Voorhees was Treasurer of the American Bar Association from 1927 to 1945.

The voluntary association functioned until 1931. Mr. Voorhees had stepped out of the office of Secretary at the meeting held in the summer of 1926, having served in that capacity for twenty-eight years. Karl Goldsmith, of Pierre, was elected his successor.

Two years later John Voorhees was elected President. After his experience over more than a quarter of a century as Secretary, he felt that the association needed to be more closely knit to achieve real effectiveness, and in his address at the annual meeting in 1929, he proposed that the Bar of South Dakota be integrated by statute. Committees were set up to carry out the proposal and the legislature, meeting in 1931, passed the State Bar Act (Chapter 84, Laws of 1931) under which the lawyers of South Dakota have operated since. At the annual meeting in the fall of 1931, the integration was completed by the adoption of by-laws and the election of officers. Matthew A. Brown, of Chamberlain, was elected first President of The State Bar, and W. W. Knight, of Brookings, Vice President. Karl Goldsmith continued as Secretary (and as Secretary-Treasurer after the offices were combined in 1947) until 1952, a period of twenty-six years of service. Leo D. Heck, of Pierre, succeeded him.

Largely through the sustained efforts of the late Judge Van Buren Perry, The State Bar, in August, 1933, passed a resolution creating a Judicial Council to study the administration of justice in South Dakota.

The State Bar was instrumental in securing passage of an act in the 1937 Legislature providing for a Code Commission to produce a revised Code for South Dakota. The Commission consisted of former Supreme Court Judge Dwight Campbell, Holton Davenport and former Governor M. Q. Sharpe, the latter being the Chief Revisor. Many of the subjects were assigned to State Bar groups for revision and editing, and the lawyers devoted much of their time to this work. For its activities and assistance in producing the Code, The State Bar received the American Bar Association Award of Merit in 1939.

About the time of the publication of the South Dakota Code of 1939, some of the lawyers gave consideration to continuing code revision under a permanent Revisor of Statutes, but the idea might have "died aborning" had not the accumulation of some seven biennial session law volumes indicated the need for an immediate compilation of some sort. At the 1950 annual meeting a committee was selected to study the matter and prospects of creating the office of a permanent code revisor with a mandate to report at the next annual meeting. Since it seemed propitious to present the matter to the 1951 Legislature, and the Legislature enacted a law that made the Supreme Court Reporter *ex officio* the Revisor of Statutes and directed him to produce a Supplement to the South Dakota Code of 1939 to contain all of the laws of a general nature passed since the adoption of the 1939 Code. This Supplement, in effect a compilation, was produced and published in 1952 by the Revisor at state expense.

In the interim between the inception of the voluntary association in 1897 and the integration in 1931, the members were very active in initiating and sponsoring two Code revisions. As early as 1899, the association adopted a resolution calling for a complete revision of the code of laws adopted in 1877. As a result of this resolution the Legislature enacted Chapter 183 of the Laws of 1901 authorizing such revision and commanding the Governor to appoint a commission to work on the task involved. Through the efforts of this Commission the Revised Code of 1903 was produced. The proceedings of the 1916 annual meeting disclose that a resolution was adopted calling for another Code revision and presentation to the next Legislature. That body passed Chapter 106 of the Laws of 1917 which authorized a revision and required the Governor to appoint a commission to perform the task which revised and produced the 1919 Code in two volumes.

The voluntary association from its inception in 1897 to its integration in 1931 published and furnished its members intermittently with printed copies of a Minimum Fee Schedule.

Immediately following integration, steps were taken to publish a bar journal. Alvin E. Waggoner, of Philip, was selected as the editor, and the first volume commenced in July, 1932. This *Journal* has since been published quarterly, the October issue of each year being used to record the proceedings of the preceding annual meeting. The *Journal* has been edited by Mr. Heck since 1953.

Volume 4 of the South Dakota Code

of 1939 carries the annotations of Supreme Court decisions interpreting the various sections and chapters of the Code. Karl Goldsmith, the Secretary-Treasurer at that time, was also the Reporter of the Supreme Court, which made it convenient for The State Bar to assume the obligation of keeping the annotations current; thereafter subsequent annotations were printed and furnished quarterly to the members of the Bar and other users of the Code without cost to the state. In January of each year the annotations were cumulated into a pamphlet produced in a form that could be inserted in the pocket provided in the back of Volume 4.

This procedure was followed until 1956 when the printed cumulated annotations became too bulky as a pocket part system. The annotations were then published in a separate volume and furnished to the Code users at a nominal cost. Since 1956, pocket parts have been supplied for the subsequent annotations. Leo D. Heck, who took over the duties of Secretary-Treasurer in 1952, is the Reporter of the Supreme Court and has continued to publish the annotations from that date.

The by-laws provide for a Standing Committee on Public Information. Municipal Judge George W. Crane, of Aberdeen, and his successor T. M. Bailey, Jr., of Sioux Falls, have devoted much time to preparing, publishing and disseminating pamphlets for the edification of the general public on legal subjects and practices. These pamphlets contain documented information on such subjects as "Have You Seen a Lawyer?", "Have You Made a Will?", "The Buying and Selling of Your Home", "Land Mortgages, Foreclosures and Redemption", "So You're Going to be a Witness!" and "Joint Tenancy". Pamphlet racks are placed in banks, law offices and public offices, and filled from time to time. Another pamphlet on "Jury Duty" has been printed in great numbers, and is supplied at cost to the various counties of the state. These pamphlets are mailed by the clerks to the members of the circuit court jury panels as they are ordered. In addition the committee publishes a monthly news letter containing news about The State Bar and its individual members, a short résumé of cases appealed to the Supreme Court, and other matters of interest.

During the entire existence of The South Dakota Bar Association, as a voluntary association and as an integrated Bar, its headquarters have been in the office of the Secretary-Treasurer; they are now in the office of the present incumbent in the Capitol Building at Pierre, South Dakota.

When additional office space was required for the departments of the state government, agitation developed for construction of a new Judiciary Building. At the last annual meeting, President Herbert B. Rudolph suggested that The State Bar make a drive for such a building, and a committee was appointed to follow through. The committee went right to work, and the preliminary plans show space for the Supreme Court, the administrative offices of The State Bar, a room to house the records, files and library, and an auditorium for meetings of limited size. Such a building will provide the first real headquarters for the organization.

Also, some thought is being given to the incorporation of a South Dakota Bar Foundation, one of whose purposes is to receive bequests, donations and other funds earmarked for a separate building for The State Bar.

Thus, after more than sixty years of existence, it appears that The State Bar will soon be provided with a real headquarters—a permanent home for the guardians of South Dakota justice.

The 77th Annual Meeting of the Tennessee Bar Association was held in Memphis on June 12-14.

The officers elected for this year are Lon P. MacFarland, of Columbia, President; Erby L. Jenkins, of Knoxville, President-Elect; William P. Moss, of Jackson, Maynard Tipps, of Tullahoma, and Jere T. Tipton, of Chattanooga, Vice Presidents. The Secretary-Treasurer, J. Victor Barr, Jr., of Nashville, was re-elected.

One session was devoted to a symposium on unauthorized practice of the law participated in by Melvin F. Adler, of Fort Worth, Texas, Executive Secretary of the American Bar Association's

Lon P. MacFarland

Standing Committee on Unauthorized Practice of the Law; F. Trowbridge vom Baur, of Washington, D. C., General Counsel for the Navy; John S. Porter of Memphis; and U. A. Gentry, of Little Rock, Arkansas.

Among the principal speakers at the meeting were Governor Frank G. Clement, Charles S. Rhyne, President of the American Bar Association, and Roger Branigan, former President of the Indiana Bar Association.

The Illinois Courts Bulletin published monthly by the Illinois State Bar Association has recently been reorganized, has a new format and is being edited by Richard B. Allen. The publication contains digests of decisions in the Illinois Supreme Court, the Illinois appellate courts and the United States Court of Appeals for the Seventh Circuit, which appear in the *Bulletin* before the publication of the opinions in the advance sheets.

A unique feature is a department giving questions presented in cases pending in the Supreme Court of Illinois. There is also a listing of cases on appeal to the United States Supreme Court from Illinois state courts and federal courts in Illinois. When space permits, interpretative and analytical articles are carried. Some of the recent ones have dealt with statistics of dissents in the Illinois Supreme Court during the last three years, with legislation in the 85th Congress aimed at the Supreme Court of the United States and with grounds raised by prisoners petitioning the state Supreme Court for relief under the Illinois Post-Conviction Hearing Act.

The publication is available by subscription to members of the Illinois State Bar Association for $8.00 a year.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

DOOLEY: From Fifth Avenue, Manhattan (the part the British are supposed to own), my good friend Louis S. Posner, Esquire, writes:

> Your article in the June issue of the AMERICAN BAR ASSOCIATION JOURNAL (44 A.B.A.J. 585) relating to Dooley on Torts was delightful. It brought to mind the verses I learned as a youngster about
>
> Six blind men of Hindustan
> To learning much inclined,
> Who went to see the elephant
> Though all of them were blind
> That each by observation
> Might satisfy his mind.
>
> The tale recounts how each reached a different opinion, according to whether he came in contact with the elephant's side or tusks or tail, etc., and the concluding lines are:
>
> And so these men of Hindustan
> Disputed loud and long,
> Each in his own opinion
> Exceeding stiff and strong
> Though each was partly in the right
> And all were in the wrong.

The author, James M. Marsh, Esquire, from Philadelphia writes that in addition to *Case and Comment*, his piece was reprinted in the *Missouri Bar Journal*, the *Los Angeles Bar Journal*, the *Kentucky Bar Journal*, the *Alabama Lawyer*, the *Bulletin* published by the Claims Division of the Association of American Railroads and the *Richmond News Leader*. In addition R. E. Megarry, Q. C., in far off England, book review editor of the *Law Quarterly Review*, plans to include it in the next edition of his book *Miscellany-at-Law*, and at Richmond, Virginia, John G. May, Jr., of the Virginia Bar, has requested permission to include it in a new edition of his book *The Lighter Side of the Law* (published in 1956 by The Michie Company of Charlottesville, Virginia; price: $5.00).

Mr. Marsh did two prior pieces on Mr. Dooley. Though neither compares with the superb "Mr. Dooley Discovers a Unanimous Dissent", (upon which I commented in June), both have great merit, and were also published in *The Shingle*, a monthly magazine of the Philadelphia Bar Association. One is entitled "The 'Supreme Court': Mr. Dooley Should Take Another Look" (Vol. 16, No. 6, June, 1953, pages 179-184) and the other "The Learned Court Below" (Vol. 19, No. 8, November, 1956, pages 177-180).

Reading these prior pieces set me on the trail of "Mr. Dooley". It led to the discovery of the anthology written by Professor Elmer Ellis of the University of Missouri and published in 1938 by Charles Scribner's Sons under the title *Mr. Dooley at His Best*. This is an excellent collection and definitely a book to acquire. Along with it, read as I have with great enjoyment the life of Finley Peter Dunne, the Chicago newspaper man who created Mr. Dooley. It is entitled *Mr. Dooley's America: A Life of Finley Peter Dunne* and it was written by Professor Elmer Ellis with the aid of a John Simon Guggenheim Memorial Foundation fellowship, published in 1941 by Alfred A. Knopf.

With Charles Seymour of the *Chicago Herald*, Peter Finley Dunne was a baseball reporter for the *Chicago Evening News* during the ball season of 1887. They created the colorful baseball reporting of our day. You can be sure Dunne was more interested in color than ball. The great team was the Chicago White Stockings of which Adrian Constantine ("Cap" or "Pop") Anson was Manager and for which John Clarkson, "Old Silver" Frank Flint, Fred Pfeffer, Abner Dalrymple and William R. ("Billy") Sunday played.

It was during the 1887 season that Dunne and Seymour coined the word "southpaw" as a name of a left-handed pitcher. In the Chicago park, a left-handed pitcher's throwing arm was on his south side.

When later Dunne was a reporter for the *Chicago Herald*, two of his best friends were Charles Bancroft Dillingham of the *Chicago Times* and Frank A. Vanderlip of the *Chicago Tribune*. Dillingham later became a great Broadway producer and Vanderlip a leading New York banker. The three of them hit on the idea of searching the hotel registers and interviewing prominent visitors to Chicago. They did this by sending their cards to the room of the visitor.

When for a spell of a week the distinguished visitor with regularity sent word to the hotel clerk that he would see only Mr. Charles Bancroft Dillingham, Vanderlip and Dunne retrieved the cards from the last visitor's waste basket to find they read:

> Charles Bancroft Dillingham of the Times
>
> Pete Dunne of the Police Gazette
> Frank H. Vanderlip of the Salvation Army War Cry

Dunne fell to writing Irish dialect in 1893, while on the *Chicago Post*. He found he could give political comment that way without offense. Chicago in those days had Hinky-Dink Michael Kenna and Bath-House John Coughlin and politics was a serious business. But politics was Dunne's greatest interest.

Dunne was prompted to write the Dooley essays by conversations he heard in the saloon of James McGarry that newsmen frequented. McGarry is the one who, when asked by his bartender: "Is George Babbitt good for a drink?" had the good sense to inquire whether Babbitt had drunk it. When the bartender answered: "He has", McGarry replied: "He is".

Dunne first wrote of conversations between Colonel McNeary and an Irish Republican politician in Chicago named John McKenna. McKenna loved

the publicity, but McGarry hated it and went to John R. Walsh, the banker who then owned the *Chicago Post*. At Walsh's request Dunne sent "Colonel McNeary" home to Ireland and transferred the scene to McKenna's ward on Archer Avenue at the fictitious saloon of Martin Dooley. Later, much to McKenna's regret, when Dunne transferred to the *Times-Herald*, a Republican paper, he had to drop the Irish Republican McKenna for "the great listener, Mr. Hennessy, typical Irish Democrat of Archey Road". Professor Ellis tells us the change to Hennessy was the more desirable in that as a day laborer with four children, he was more typical of "Archey Road", and being pseudonymous enabled Dunne to have "Mr. Dooley" abuse him in ways he could not treat his friend, John McKenna.

As Franklin P. Adams points out in a foreword to the Ellis anthology, Dunne was an artist—a perfectionist—and he found writing the Dooley pieces real hard work. Being right-footed, Irish and human, after 1910 when he had amassed considerable money and deserted Chicago for Manhattan and Southampton, he produced very few indeed. In 1927 when his friend Payne Whitney died and left him over half a million dollars, he quit entirely. He died in the spring of 1936, then in his sixty-ninth year.

By 1910 Finley Peter Dunne was honored as "Mr. Dooley" in this country and abroad. By virtue of his review of President Theodore Roosevelt's book, *The Rough Riders*, Dunne ultimately became one of that President's closest friends. Dooley's review read in part:

> T'is th' Biography iv a Hero be Wan who Knows. T'is th' Darin' Exploits iv a Brave Man be an Actual Eye Witness.
>
> * * *
>
> I think Tiddy Rosenfelt is all right an' if he wants to blow his own horn, lave him do it, said Mr. Hennessy.

Mr. Dooley agreed and wisely remarked:

> No man that bears a gredge again himself 'll iver be governor iv a state. An' if Tiddy done it all, he ought to say so an' relieve th' suspinse. But if I was him, I'd call th' book, "Alone in Cubia?"

It is a great tribute to Theodore Roosevelt that he took the piece in such good humor. That endeared him to Dunne.

As a political scientist Ellis does not include in his splendid anthology Dunne's piece entitled "The Law's Delays". You will find it in the collection that Dunne allowed his friend R. H. Russell to publish in 1902 entitled "Observations of Mr. Dooley".

It is this piece that begins by Mr. Dooley's saying to "Mr. Hinnissy" across his bar,

> If I had me job to pick out . . . I'd be a judge. I've looked over all th' others an' that's th' on'y wan that suits. I have th' judicyal timperamint. I hate wurruk.

and concludes:

> "I don't see", said Mr. Hennessy, "why they have anny juries. Why don't they thry ivry man before th' supreme coort an' have done with it?"
>
> "I have a betther way than that", said Mr. Dooley. "Ye see they're wurrukin' on time now. I wondher if they wudden't shtep livlier if they were paid be th' piece."

In writing his other article "The 'Supreme Court': Mr. Dooley Should Take Another Look", Marsh was inspired by "The Supreme Court's Decisions" first published by Harper's in 1906 in a collection called *Mr. Dooley's Opinions* but fortunately included by Professor Ellis in his anthology. From time to time when some poor lawyer loses a case in the Supreme Court of the United States, he finds on analyzing the opinions that a majority of the Court agreed with him with respect to the various points he argued taken separately. As a result there may be what Mr. Justice Clark dubs "a principal opinion" but not what Chief Justice Marshall would call "the Court's opinion". Marsh calls attention to *Brown* v. *Allen*, 344 U.S. 443, and *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, as examples. Every lawyer can add an example or two of his own.

Dunne wrote his piece around *Downes v. Bidwell*, 182 U.S. 244 (1901), one of the *Insular* cases that upheld five to four the constitutionality of the Foraker Act which imposed a tariff of 15 per cent on "a cargo iv limons sint fr'm Porther Ricky to some Eyetalian in Philydelply". His description of the various opinions of the different Justices rivals Marsh's "Mr. Dooley Discovers a Unanimous Dissent" (June, 1957, *The Shingle*, reprinted 62 *Case and Comment* 8).

The remarkable thing is that *Downes* v. *Bidwell* was re-examined but recently in *Reid* v. *Covert*, 354 U.S. 1, and the same variety and uncertainty of opinion was expressed. Even Mr. Justice Harlan the Second dissented from Mr. Justice Harlan the First.

As you read Dooley, you'd think he was talking about *Reid* v. *Covert* in 1957 rather than *Downes* v. *Bidwell* in 1901. Listen:

> "I see", said Mr. Dooley, "th' Supreme Court has decided th' Constitution don't follow the flag."
>
> "Who said it did?" asked Mr. Hennessy.
>
> "Some wan", said Mr. Dooley. "It happened a long time ago but some fellow said that ivrywhere th' Constitution wint the flag was sure to go. 'I don't believe one word iv it,' says the other fellow . . . 'It's too old. It's a home-stayin' Constitution . . . It's old an' it's feeble, an' prefers to set on th' front stoop . . . It wudden't last a minyit in thim thropical climes. T'wud get a pain in th' fourteenth amindment . . .' 'But,' says th' other, 'if it wants to thravel, why not lave it?' 'But it don't want to.' 'I say it does.' 'How'll we find out.' 'We'll ask the Supreme Court. They know what's good for it.'"

There follows a discussion of the long wait for the Supreme Court to decide. The fact that "Ye don't get a check that entitled ye to call f'r it in an hour" and "The Supreme Court iv th' United States ain't in anny hurry about catchin' th' mails. It don't have to make th' last car." and "if ye're lookin' f'r a game iv quick decisions an' base hits, ye've got to hire another empire."

By the time the Court decided the case, Mr. Dooley said "th' men" that "argyied" the case had "died or went back to Salem an' were forgotten."

Then, just as Dooley was about to

forget the matter "an' go back to wurruk" he "see be th' paaper that th' Supreme Coort had warned the Constitution to lave th' flag alone an' tind to its own business".

Mr. Dooley, of course rushes to read the decision and his troubles begin. "They'se not a wurrud about the flag an' not enough to tire ye about the Constitution." And says Dooley, "What do they say about limons? Nawthin' at all." And he concludes, "If I cudden't write a betther wan with blindhers on, I'd leap off the bench."

Turning to his great listener, Mr. Dooley says:

> "An' there ye have th' decision, Hinnissy, that's shaken th' intellicts iv th' nation to their very foundations, or will if they thry to read it. T'is all right. Look it over some time. T'is a fine spoort if ye don't care f'r checkers. Some say it laves th' flag up in th' air an' some say that's where it laves th' Constitution. Annyhow, something's in th' air. But there's wan thing I'm sure about."
>
> "What's that?" asked Mr. Hennessy.
>
> "That is," said Mr. Dooley, "no matther whether th' Constitution follows th' flag or not, th' Supreme Coort follows th' iliction returns."

Time has come for law schools to require that applicants have a knowledge of Finley Peter Dunne and Mr. Dooley. The ones that think like Dooley are sure bets.

TAXATION: *The Record* of The Association of the Bar of the City of New York regularly carries comments on recent decisions that are of permanent value. In the April, 1958, issue (Volume 13, Number 4, pages 236-242; address: 42 West 44th Street, New York 36.; price: not stated) the editors of that department (William M. Matteson and Leonard M. Leiman) comment upon the four recent defense tax cases: *Borg-Warner* v. *City of Detroit*, Docket 26; *U.S.* v. *Township of Muskegon* and *Continental Motor* v. *Township of Muskegon*, Docket Nos. 37 and 38; *City of Detroit* v. *Murray Corporation*, Docket Nos. 18 and 36; and *American Motors Corporation* v. *City of Kenosha*, Docket No. 343.

The *Borg-Warner* and *Continental Motors* cases involved real estate taxes levied against those companies but measured by the full value of the occupied plants, both of which were owned by the United States. Michigan made its levy under a special statute (Public Law 189) that subjects to taxation real estate of tax-exempt owners when leased to private corporations in connection with a business conducted for profit. Interestingly enough the Michigan statute excepts from taxation: "where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to use of the general public" and "federal property for which payments are made in lieu of taxes" and also "property of any state-supported educational institution".

In *Murray Corporation* and *American Motors*, Michigan and Wisconsin taxed personal property belonging to the United States in the possession of the two companies under each state's regular personal property *ad valorem* tax. As Messrs. Matteson and Leiman say, under *Murray*, "the City of Detroit could have taxed Borg-Warner and Continental even without Public Law 189, as long as the City was careful to respect the immunity of the Government and its specific property" (page 242).

In all four cases the Court upheld the state tax. In *Borg Warner* and *Continental Motors* the vote was seven to two, only Justices Whittaker and Burton dissenting. However, in *Murray* and *American Motors* the vote was five to four, Justices Harlan and Frankfurter joining Justices Whittaker and Burton in dissent.

Commenting on *Murray* and *American Motors*, Matteson and Leiman say that "by reading a general property tax as if it were a privilege tax (with or without the aid of Public Law 189) the Court has for the first time permitted equal taxation of Government property used by private persons in their business. What the Court has done in effect is to allow the State to collect a tax on immune property in the guise of a compensating 'privilege' tax. . . . Ironically, the imposition of a compensating 'privilege' tax on tax-exempt property may in itself be considered discriminatory, as it places such property on a level with all other property, thereby eliminating its privileged status" (page 242).

The two commentators question the Court's expressed desire to defer to congressional decision such taxes. They say, "By refusing to grant immunity" the Court "has in fact made a decision and what is even more troublesome, it has narrowed an important constitutional guarantee of the Federal Government." Matteson and Leiman believe it would have been better for the Congress "to affirmatively waive immunity consent to taxation" and they predict the decisions will cause trouble.

Little did Matteson and Leiman know how true they spoke. Estimating that the tax would cost the United States "some 658 million dollars per year", the Solicitor General moved for rehearing of both the *Murray Corporation* and *American Motors* decisions.

The fact that the Solicitor General did this is significant. It is nine years (the *Brown* case at the October, 1948, Term) since he has asked a rehearing of a case decided against the Government after formal opinions on the merits. In recent years the only applications by the Solicitor General for rehearing were in a few instances when certiorari was denied or the case resulted in a tie four-to-four vote. And apparently one of these attempts was successful.

The practice on rehearing is not to require an answer to the petition by the winner unless directed by the Court. On March 31, 1958, the Court directed the City of Detroit to answer the petitions for rehearing in *Murray* and the City of Kenosha in *American Motors*. If the pattern of *Reid* v. *Covert* and the *Ohio Power* cases at the October, 1955 and 1956, Terms obtain, we can look to a re-argument of *Murray* and *American Motors* at the October, 1958, Term. The Court gave until May 13 for the Cities of Detroit and Kenosha to answer, and this must mean at least one Justice is considering changing his vote. There is a chance the Government may win back at the October, 1958, Term the *Murray* and *American Motors* cases, it lost at the October, 1957, Term.

The Annual Address

(Continued from page 940)

immemorial. It has a tremendous potential value but in any given area, until the institution of the courts is created so that law can be used there, the law is never harnessed to realize its full potential in benefits to mankind.

8. Existing Court Inadequate

We therefore have the instrumentality of the rule of law readily available; but the *sine qua non* of this plan for peace is a world-wide court system to make law accessible and usable. Within nations we have thousands of courts, local, state, regional and national. But for the entire world community we have only one court. It is the International Court of Justice. The Court has fifteen judges. It has decided ten cases in the twelve years of its existence. The major nations of the world seemingly ignore its availability and utility.

Our own country — despite the American Bar Association's express opposition to this policy[5]—reserves to itself the right to decide whether complaints filed in the International Court of Justice are within the domestic jurisdiction of the United States. Such a stultifying provision says to the world that we decline to trust the Court to rule correctly on such an issue. This lack of respect by us, and by other nations with similar reservations, has largely destroyed the prestige and usefulness of the Court. The inaccessibility of the Court also contributes to the failure of nations to use it. It is the present practice of the Court to hold all of its hearing at The Hague.

The United States should assume leadership in creating respect and prestige for the Court by removing our reservation on jurisdiction. The Court can itself make its processes more useful and accessible by sitting constantly at the seat of the United Nations in New York. The Court should also announce its willingness to sit all over the world in chambers of three judges. Its charter now authorizes such action by the Court, but it has done nothing to make this provision meaningful. These are things which the United States can do, and which the Court can do, to move the Court forward toward its potential use as a mechanism for peace. But more is needed to make law and the courts serve as they can and must in this vital field.

Applying the lesson of history, we need to go beyond the present structure of the International Court of Justice and create an entirely new and additional world-wide system of courts to make law as an instrumentality for peace accessible to the people throughout the world. A system of circuit courts under the International Court of Justice is needed. Perhaps we should go beyond that and have one judge sitting constantly in a branch of the world court system in each sovereign nation. There could be intermediate courts of appeals on a regional basis with a final appeal to the International Court of Justice. Such a world legal system would parallel in the international community the setup of the federal court system in the United States.

Without the institution of the courts the rule of law cannot be made effective internationally. An international judicial system would throw a blanket of law over the world. Any nation refusing to participate would be automatically branded as "outlaw" by world public opinion.

The cost of a world judicial system is estimated at about ten million dollars per year. The cost of military expenditures for our nation alone is forty billion, and world wide it is more than one hundred billion dollars yearly. Elimination of all military costs is not a reasonable expectation, but the small cost of a world judiciary and its great potential stand in stark contrast to the ever-mounting budgets for military needs.

9. Jurisdiction of New World Court System

The jurisdiction of the new world court system should include all disputes between nations whose resolution depends upon facts and the application of the principles of the rule of law: Such cases as our flyers who recently wandered off course behind the Iron Curtain, the truth or falsity of propaganda charges which so often bring the world to the brink of war,[6] the Suez controversy, the Spanish-Morocco boundary dispute, many of the current Middle East controversies, and hundreds of similar incidents and disagreements which are fast multiplying in our shrunken world with its rising number of international contacts. If the proposed treaty guaranteeing world investment becomes a reality, disputes thereunder could go to the international judiciary for resolution. Disputes arising under the European Economic Community already are resolved by the new International Court created for that express purpose. I have not the slightest doubt that a world judicial system will prove its value once it is in operation.

10. Enforcement of World Court Judgments

Enforcement of World Court decrees and judgments would depend in the first instance, as it does now within nations, upon voluntary compliance. The pressure of public opinion is such that very few nations would want to stand before the world branded as an "outlaw" for defying a decree of a World Court. Full faith and credit could be granted also by national courts to the decrees and judgments of world courts, thus permitting enforcement to be sought in such national forums. If enforcement is refused, or prevented, diplomatic and economic sanctions could be imposed. Finally, some kind of world police force has been suggested for use in extreme cases under proper safeguard. The latter idea would certainly require extreme caution, care and insurance

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5. 71 A.B.A. Rep. 91, 316.

6. Fact finding would be an important part of the functions of the new World Court system. John Watson Foster, a former Secretary of State and grandfather of Secretary of State John Foster Dulles, in an address entitled, "The Foreign Wars of the United States" delivered before the American Society for Judicial Settlement of International Disputes on December 15, 1910, reviewed the facts leading to all the foreign wars of the United States up to that date, that is the War of 1812, the Mexican War and the Spanish War. He concluded that some began under mistakes as to existing facts and that each could have been settled under the rule of law in tribunals of justice without resort to war. His final observation was: "I do not say that we shall have no more foreign wars, but I do say that our experience teaches that if we exercise justice, forbearance and patience, and seek peace through methods proposed by this Society (*i.e.*, law and a judiciary) an honorable way may be found of adjusting all our international differences."

against misuse and abuse but experience with such a force already indicates it can be useful in proper situations.

11. Support for World Peace Through Law

Support for the idea of world peace through law comes from many of the leaders of the world. President Eisenhower said in his Law Day—U.S.A. message that:

> The world no longer has a choice between force and law; if civilization is to survive, it must choose the rule of law.

Secretary of State Dulles said in his Law Day—U.S.A. message:

> In international affairs it is impossible to sustain a just and lasting peace unless that peace is based upon law and order.

Henry R. Luce, who has done more than any other person to further world peace through law, wrote in a full-page editorial in *Life*:

> There is a hunger and thirst for the rule of law throughout the thinking part of the world.

The Chief Justice of the Supreme Court of Japan, Kotaro Tanaka, has said:

> The realization of justice is a thing which interests not only one nation but all the nations of the world.

The Chief Justice of Pakistan, Muhammad Munir, in dedicating the new Pakistan Legal Center, paid tribute to the rule of law and called upon lawyers to lead toward a lawful world, saying:

> The task is essentially one for lawyers because they are the technicians of democracy and specialists in man's relation to man.

The President of this Center, Chaudri Nazir Aham Khan, said:

> For us Muslims the Rule of Law is like an article of faith. When we talk of the rule of law we are talking of an Islamic concept and an Islamic way of life.

Daulet Ram Prem, Editor of the *Indian Law Quarterly Review*, in an open letter to the American Bar Association concludes:

> Let us join hands and cooperate in the sacred trust of bringing about equality, justice, right of self-determination, and dignity of man not only in our respective countries but throughout the world.

These are illustrative only. There have been many other recent statements from leading jurists, lawyers and laymen all over the world strongly supporting world peace through law.

In our own country many leaders of the Bar and others have expressed strong support for this great ideal, and have urged the American Bar Association to intensify its work in the field. Governor Thomas E. Dewey has headed a special American Bar Association Committee on International Law Planning which will report to this Annual Meeting on the current status and future possibilities of peace through law. State and local bar associations have created new committees to work specifically on this idea.

The International Bar Association has made world peace through law its major program. Many newspaper editorials written in connection with Law Day — U.S.A. and our Association's effort in the world law field have strongly endorsed the objectives of this idea. And judging from letters to magazine and newspaper editors, as well as from other writings and discussions, the public at large is evidencing a rapidly increasing interest.

A "World Law Conference" is being planned for May of next year. Duke University has created a new "World Rule of Law Center" and one of President Eisenhower's Assistants, Arthur Larson, has resigned to head that Center. The President retained Mr. Larson as a special presidential consultant, however, and charged him with the responsibility of reporting on ways the Federal Government can help achieve world peace through law.

Grenville Clark and Louis B. Sohn have written a most outstanding book entitled *World Peace Through World Law* which presents a plan for reorganization of the United Nations. While theirs is a different, more far-reaching, and more complicated plan than that of utilizing law in a world court system the ideal is the same.

There is, therefore, a rising tide of interest throughout our country and the whole world in peace through law. But we need to get beyond words to action. The ideal of today must become the reality of tomorrow. Pious phrases and slogans will not create peace. For if mere wishing would create peace, we would have had peace years ago.

12. Objections to World Peace Through Law

World peace through law is not put forward as a Utopian scheme for a perfect world community, and the plan here espoused is limited to use of law in a world court system. But there are those who oppose even this modest beginning toward settlement of conflicts between nations in a civilized manner. The objections can be classified as follows: (1) This plan is an idealistic dream, (2) Law has been around from time immemorial but has not stopped wars, (3) The international judiciary might make some wrong decisions, (4) The plan is just too difficult to create and get into operation, (5) Such a plan would never work because Russia would not join in it, and (6) The world community needs more than just a judiciary.

To say that peace through law in the courts is an idealistic dream which therefore cannot be realized is to deny the facts of history. America was built on idealism. Idealism burned fiercely in the breasts of Washington, Jefferson, Madison and all of those other great forefathers of ours who founded our nation as a government under the rule of law. They utilized law and the courts to make our rulers subject to the ruled. Such a plan was pure idealism when adopted, but it has worked. If we ever reach the stage when idealism is a curse rather than a virtue our nation will have lost the ingredient which has made it the greatest the world has ever known. Woodrow Wilson said: "The world is run by its ideals. Only the fool thinks otherwise."

Certain it is that law has been around for many years, and granted, it has not stopped wars. The outlawing of war through the Kellogg-Briand Pact did not stop wars because that Pact had no institution of a world court system to implement it. The

mechanism of law plus the institution of the courts has never been tried in the way herein urged. In this respect, law is like religion. It has not failed; it has never really been tried. Within nations law plus the courts has certainly brought peace. On such a record of accomplishment it is reasonable to believe that such a mechanism can do the same if utilized in the world community.

Certain it is also that the world court system would be manned by human beings and those human beings may sometimes decide contrary to our wishes and even make "wrong" decisions. Law plus the courts is not a cure-all. It will not end disputes and quarrels between nations. It does not end them now within nations. There will still be conflicts, and there will still be law-breakers among nations as there are now within nations. But court decisions if contrary to fact and reason are always subject to change, while the millions of gravestones all over the world are mute testimony to the unchangeability of the results of war. A few "wrong" court decisions do not destroy the value of this plan, any more than a few "wrong" court decisions destroy the value of the use of law in the courts within nations. Few will deny that it is better to have a few "wrong" court decisions than millions of deaths in all-out nuclear war.

As to the objection that an effective international judicial system will be too difficult to create and get into operation, twentieth century man has not let difficulties prevent him from accomplishing other seemingly impossible goals. A short time ago the splitting of the atom was looked upon as an unrealizable dream but now it is a reality. A short time ago the satellite was a fantastic dream, but now it is a reality. Twentieth century man has developed a technique for concentration of the talents of many people on seemingly insoluble problems so as to achieve a "break-through". So it was with the atom and so it was with the satellite. And so it can be with world peace through law. We know the goal and the general outline of the mechanism just as well as we knew the goal and the general outline of the mechanisms to use in connection with splitting the atom and launching the satellite. If we move forward with the same kind of "crash" program, the same concentration of brainpower and money, that we utilized in reaching those goals, the achievement of this great goal of peace through law is not only possible but extremely probable.

We must face the fact that despite the interest expressed by Russian lawyers on my recent visit with the American Bar Association delegation to the Soviet Union, Russia will probably not agree to use of the rule of law in a world-wide court system as a mechanism for settlement of international disputes, particularly those in which she is involved. But to let Russia exercise a veto preventing the creation of this world court system would give the Kremlin an unthinkable control over world progress toward peace. The world court system can operate without the Soviet Union. After this court system is established, and as it demonstrates its worth by use outside the Iron Curtain, it will have a tremendous attraction for the neutral and uncommitted nations. These nations want peace so that their social and economic development plans can go forward and will want to join in any system which brings world peace. Russia's propaganda which is now directed so strongly to those nations would have no answer to the liberty, equality and justice which the world court system offers as contrasted with slaughter on the battlefield. If Russia refuses to use this mechanism, and the Free World does use it, Russia's adherence to lawlessness would be crystal clear to the whole world. Here only actions would count. With the increasing education of the Russian people, and the strong desire for peace which persists in the hearts of men even behind the Iron Curtain, perhaps this plan might even reduce the depth of the Iron Curtain itself. Adherence to this plan by nations seeking freedom from the Russian Colonial Empire is certainly a very real possibility. The lawyers of Yugoslavia with whom our American Bar delegation conferred in Belgrade recently indicated tremendous interest in this idea.

I quickly concede that the world community has been reluctant to make much use of law in the past, and that it needs more than just a new world court system. All I contend for here is that use of law in the courts will aid in preventing wars so that the other needs of the world community can be met through other mechanisms. It is my sincere belief that law in the courts could settle many disputes between nations and thereby create a favorable —a peaceful—climate within which better progress can be made toward solution of the other great problems of mankind. And any war that is prevented leaves more living people to work on such problems and more material strength to devote to constructive rather than destructive purposes.

13. Other Plans for Peace

Disarmament agreements have been given much prominence as a plan for peace. But since the failure of the London disarmament discussions last year that idea has lost much force. Disarmament conferences have been held down through the centuries but no agreement resulting from such a conference has ever contained a successful formula to maintain peace. The best evidence of this is the fact that every disarmament agreement has been followed sooner or later by an arms race —then war. A study of these agreements reveals that the reason they have failed is an inherent inability to devise a method for so weighing armed might that all participants would always feel that they were treated equally. The rule of law avoids this inherent defect, as all nations would be on a basis of equality before the law.

World government has not made progress because a world legislative assembly with weighted representation has not gained widespread acceptance. The idea of re-doing the United Nations into an effective world government has now been put into a concrete proposed plan by Clark and Sohn. But a study of their plan reveals that there is too much to do, and too many stumbling blocks, to hope for rapid progress toward such a mechanism. Applying the judicial concept on a working basis seems to be a much more realistic

approach to peace in the world of today.

Religion as a moral basis for peace has strong appeal to those of us who believe in God and the natural law. But there are differences in dogma and belief which have stood as roadblocks to the use of religion as a universal foundation for peace. Separation of church and state is basic in our way of life even though our system of government is in its ultimate essence based upon strongly felt religious and moral principles. But religion is, as was said so well by Dr. Harold A. Bosley in his recent Baccalaureate Sermon "Pardon My Idealism" at the Duke University Commencement, something beyond and above government under law. He said that religious faith "stands far beyond the forms of democracy as we now know and enjoy it and says 'come on up higher.'" Acceptance of law as a plan for peace can be a first hopeful step toward a climate for better acceptance of the great principles of religion in places where they are not now favored. After we arrive at such a step we can concentrate on "coming on up higher".

14. How To Achieve Peace Through Law and the Courts

We already have the principles of the rule of law and the beginnings of a world judiciary in the International Court of Justice. Our problem is how to put this mechanism to work to achieve and maintain peace. We should begin by putting the International Court of Justice to work now while awaiting the creation of the additional world system of courts which is essential to the achievement of world peace through law.

We live in a world of ideas. Strength today resides in man's mind. When people throughout the world understand what law and courts can do to prevent the unimaginable horrors of World War III, public opinion will crystallize behind the rule of law in such a powerful way as to insure its use. When the value of going to court instead of to war is fully understood, the people of the world will demand, and get, the world-wide judicial system that effective application of the rule of law requires.

In achieving world peace through law, it is not so much a knowledge of ways and means that we lack as it is a lack of the will and desire to put them into effect.

The immediate need here is for leadership—for leaders who can see beyond the turmoil of today and take the initiative to lead toward a peaceful tomorrow. Lawyers are by training and tradition leaders in the discussion of the great public issues of the day. Already our profession through Law Day—U.S.A. has laid the beginning of the foundation in public opinion for progress toward peace through law. We have identified law and lawyers with man's yearning for peace. But this is not a job for the short-winded. It is not a task which can be completed in a day, or in a month, or in a year, or even in a decade. There is an old Chinese proverb that "The longest journey begins with the first step." The sooner we take this first step and many more steps the sooner the world will move toward peace and away from its present drift toward war.

Public opinion largely controls governmental action today. Without a demand from the people new programs are rarely adopted. It is the lawyer's job to create the ground swell of public support that is needed to advance the concept of law in the courts as an answer to war. The legal profession must continue to educate our people on the value of law by another Law Day—U.S.A. We must help other nations of the free world conduct their own Law Days so as to create a favorable climate for law on a world-wide basis. We must then join hands with lawyers all over the world and stage World Law Day. Finally we must plan and execute a World Law Year to focus the attention of the people of the whole world upon what law can do for mankind. Just reflect upon what the International Geophysical Year has done for science. And remember that law, unlike science, can be used only for peace. Expansion in the use of law can mean only peace. But our people do not yet realize that great truth.

We need to convince the leaders of governments that they should assume leadership in the cause of peace through law. Governmental acceptance of this concept and governmental action toward its effectuation is obviously essential to its success. And it is governmental creation and use of a world judiciary which is our major objective.

Our nation which prides itself upon its government under law should announce to the whole world that the rule of law plus a world-wide judiciary is our number one plan for peace. It is logical that the United States be the nation which proposes this plan and which takes the lead in an active program to make it work.

We must remind our leaders in government of what James P. Warburg said: "The United States cannot, alone, save civilization, but by default of affirmative leadership, it can come perilously close to insuring civilization's end."

We American lawyers have a tremendous duty and responsibility. We of all groups appreciate that law used in a world judiciary is the key to world peace. We can and must explain this idea to all peoples. We must explain our mission of peace through law in such a way that it will ring a bell whose clarion call will reverberate around the entire world. President Eisenhower is correct in his thesis that if we do not adopt the rule of law, civilization cannot survive. Our job as lawyers is to make that point clear to all peoples.

The lawyer's responsibilities from the world of today therefore present the greatest challenge ever faced by any professional group. I am proud of our profession and proud of its tremendous accomplishments of the past. I feel certain that it will rise to this challenge and live up to this new responsibility. We lawyers will give to this task all the hard and arduous years of effort that are required to make peace under law a reality. We will succeed because we must. Failure is unthinkable when the result of our failure could be a world reduced to ashes.

The most important public service open to our legal profession today is this opportunity to mobilize the prestige and power, the sanity and the skill, the judgment and the judicial temperament of the lawyers of the world in behalf of this goal of peace under law. Never in all history has the

climate been more favorable for success if we but move swiftly, surely and carefully to meet the need that exists. We must build upon the experience of the past and the possibilities of the present to insure a peaceful future for the world.

An idea can be more powerful than the atom. And nothing can deny an idea whose time has come. We lawyers must make certain that the time of this idea of peace through law arrives before atomic annihilation overtakes mankind.

I am confident that we will.

The "Substantial Evidence" Rule

(Continued from page 949)

evidence" rule is an awkward way to achieve this desirable result. It has led to confusion between the tests that are to be employed in determining whether the testimony substantially supports the agency's findings of basic facts and the tests that are to be employed in determining whether the agency's findings of basic facts afford proper support for the inference drawn therefrom.[17]

IV. "Substantial Evidence" Test Important Only in N.L.R.B. Cases

As noted in the table reproduced above, 139 of the 188 cases studied (or 74 per cent of all the cases) involved review of N.L.R.B. orders. Most of the old-line federal agencies were but rarely involved in cases where a question as to the substantiality of the evidence was raised. The Interstate Commerce Commission and the Securities and Exchange Commission each had three such cases during the whole period under study; the Civil Aeronautics Board, four; the Federal Power Commission, five; the Federal Communications Commission, six. The Federal Trade Commission ranked second to the N.L.R.B. for the unhappy distinction as the agency whose findings were most likely to be attacked; but it was involved in only ten such cases, as compared with 139 for the National Labor Relations Board.

Even more significant, perhaps, is the circumstance that forty-six of the fifty-five cases (83.6 per cent) in which the findings were found not to be supported by substantial evidence involved the National Labor Relations Board. It was affirmed in about two cases out of three.

This circumstance strongly suggests that the difficulties of Bench and Bar are unnecessarily magnified by trying to fit all cases of administrative fact-finding into a mold that was designed primarily for this one agency, which presents a number of particular problems.

V. The Factors that Courts Take into Account in Determining Substantiality of Evidence

(1) No General Definitions

None of the Courts of Appeals have vouchsafed a definition of the term "substantial evidence". Despite the re-examination of this term in nearly 200 cases during the last five years, uncertainty as to the meaning of "substantiality" persists. In fact, the uncertainty and bewilderment seem to increase, if anything, during the years.

Before the enactment of the Administrative Procedure Act, many courts equated the "substantial evidence" test to the test applied by appellate courts in determining whether a jury verdict had been properly set aside. Under this test, the evidence was deemed substantial unless it were so slight that had the case been tried before a jury a verdict would have been directed.[18]

This test has, with the passage of years and the enactment of the Administrative Procedure Act, lost its utility. During the last five years, many of the Courts of Appeals have exhibited a willingness to set aside administrative findings even though the evidence in support of the finding was enough to have precluded the direction of a jury verdict under the federal rules.

While the courts have not been able to arrive at any generalized description

17. Because of the different attitudes exhibited by the several Courts of Appeals in reviewing the correctness of the inferences drawn by agencies from the basic facts as established by the evidence, the leading cases may be divided according to judicial circuit:

The First Circuit in *N.L.R.B.* v. *England Brothers, Inc.* (1953), 201 F. 2d 395, set aside an inference based on "an aroma of coercion".

A similar approach was employed by the Second Circuit in *N.L.R.B.* v. *James Thompson & Co.* (1953), 208 F. 2d 743, and *N.L.R.B.* v. *Business Machine Union* (1955), 228 F. 2d. 553.

The Third Circuit twice reversed District Courts for substituting their own inferences for those of the agency—*Ferenz* v. *Folsom* (1956), 237 F. 2d 46; *Livingstone* v. *Folsom* (1956), 234 F. 2d 75. But in another case the Court refused to uphold an administrative inference that if a manufacturer of salad dressings were permitted to advertise that his salad dressing included milk, housewives would be misled into thinking that this particular salad dressing must necessarily be more healthy than those which did not include milk. *Cream Wipt Food Products Co.* v. *Federal Security Administrator* (1951), 187 F. 2d 789.

The Fourth Circuit found the evidence supporting a finding to be less than substantial where the finding was "based . . . on inferences drawn from parts of the evidence while other parts of great significance have been ignored." *N.L.R.B.* v. *Hart Cotton Mills* (1951), 190 F. 2d 964.

The Fifth Circuit opinions indicate a special readiness to set aside administrative findings of the N.L.R.B. on the grounds that they are based upon unreasonable inferences. In *N.L.R.B.* v. *Houston Chronicle Publishing Co.* (1954), 211 F. 2d 848, at 854, the court declared that "when the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice". This seems to indicate a willingness on the part of the court to assume the power of determining whether an inference of guilt is as persuasive as an inference of innocence (the question arises: How can this be done without weighing the evidence?). In *N.L.R.B.* v. *Russell Manufacturing Co.* (1951), 191 F. 2d 358, the court set aside findings based upon "hearsay, inference, and suspicion" in view of the fact that the agency refused to accept uncontradicted testimony of respondent. Other cases in which the Fifth Circuit refused to sustain findings on the grounds that they were based on unreasonable inferences include: *Tampa Times Co.* v. *N.L.R.B.* (1952), 193 F. 2d 582; *N.L.R.B.* v. *Fuchs Baking Co.* (1953), 207 F. 2d 737; *N.L.R.B.* v. *International Broadcasting Co.* (1954), 209 F. 2d 912; *N.L.R.B.* v. *Blue Bell* (1955), 219 F. 2d 796; *N.L.R.B.* v. *General Drivers Local* 968 (1955), 225 F. 2d 205; *N.L.R.B.* v. *Coats & Clark, Inc.* (1956), 231 F. 2d 567 (where the court said that it was free to displace the Board's choice between conflicting inferences unless the opposed inferences were "equally reasonable"); *Sardis Luggage Co.* v. *N.L.R.B.* (1956), 234 F. 2d 190.

The Sixth and Seventh Circuits exhibit similar tendencies. For example, in *N.L.R.B.* v. *Cleveland Trust Co.* (6th Cir., 1954), 214 F. 2d 95, at 97, the court set aside an administrative finding based on inference because, said the Court, the agency had ignored "emphatic circumstances" in drawing its inferences, and the Court added that the agency "is not authorized to ignore material uncontradicted facts". In *U.S. Steel Co.* v *N.L.R.B.* (1952), 196 F. 2d 459, the court set aside findings based on inferences which the Court felt to be "clearly in error." and in *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.* (1951), 191 F. 2d 786, 792, the court set aside the findings because "the inferences on which the findings were based were so overborne by evidence calling for contrary inferences that the findings could not, on the consideration of the whole record, be deemed to be supported by substantial evidence".

The Eighth Circuit has in several cases set aside administrative findings on the ground that it believed the inferences to be unreasonable: *N.L.R.B.* v. *International Brotherhood of Teamsters* (1952), 196 F. 2d 1; *N.L.R.B.* v. *Dealers Engine Rebuilders* (1952), 199 F. 2d 249; *Local No. 3* v. *N.L.R.B.* (1954), 210 F. 2d 325. In *N.L.R.B.* v. *Continental Baking Company* (1955), 221 F. 2d 427, the court reinstated the inference made by the trial examiner, which it felt to be more reasonable than the inference the Board had reached.

The Ninth Circuit concluded that findings were not supported by substantial evidence because the basic facts did not support the inference drawn by the agency in a number of cases: *Wayside Press, Inc.* v. *N.L.R.B.* (1953), 206 F. 2d 862; *N.L.R.B.* v. *Amalgamated Meat Cutters* (1953), 202 F. 2d 671; *N.L.R.B.* v. *Reed* (1953), 206 F. 2d 184; *N.L.R.B.* v. *Sunset Minerals, Inc.* (1954), 211 F. 2d 224.

The Tenth Circuit set aside the Board's inference in *Atlas Life Ins. Co.* v. *N.L.R.B.* (1952), 195 F. 2d 136.

18. E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 89 U. Pa. Law Review, 1026.

of the meaning of "substantiality", there does appear to be fairly general agreement on various "rule-of-thumb" tests than can be utilized to determine "substantiality" in appropriate situations.

(2) Hearsay Often Held Insubstantial

A number of courts insist that findings supported only by hearsay are not supported by substantial evidence.[19]

Other courts whose opinions hint they might under some circumstances accept hearsay as "substantial" hold that the quality of substantiality is not present where the agency has relied on hearsay that is contradicted by competent direct testimony.[20]

(3)—Refusal To Accept Uncontradicted Evidence

In some courts a finding that is based on a refusal to accept uncontradicted testimony is said as a matter of law to be not supported by substantial evidence.[21]

(4)—Unpersuasive Evidence Not Substantial

In a number of cases, the Courts of Appeals have set aside findings on the ground that the evidence cited in support thereof is totally lacking in the qualities that tend to make testimony convincing.

Thus, it is said that the evidence is not "substantial" where it is "so slight as to be unpersuasive".[22]

The *unreasonableness* of the finding is sometimes enough to persuade the reviewing court that the supporting evidence is not "substantial". Thus, one administrative order was set aside because the evidence as a whole established the contrary "beyond reasonable question".[23] In another case, findings were reversed as not "reasonable".[24]

When the agency's findings are based on evidence that "merely creates a suspicion", they will be set aside.[25] The same is true if the findings are based on "suspicion and speculation",[26] or "handpicked fragments of evidence merely enough to raise a suspicion".[27]

(5) Weighing the Evidence

While courts generally deny that they have a right to weigh the evidence in determining its "substantiality", a number of courts have utilized expressions which indicate that in some instances their function comes very close, to say the least, to weighing the evidence. Thus, the evidence is said to be insubstantial if it is based on inferences drawn from circumstances in conflict with direct testimony on the point.[28] Again, it is said that "wavering, uncertain testimony" cannot outweigh the "volume of disinterested testimony" of other witnesses.[29] Similarly, it is said that the evidence is not substantial where the "solid sense of the entire record does not support the finding",[30] or where the finding is not in accordance with "reliable and probative" evidence,[31] or where the respondent's evidence *outweighs* the evidence relied on by the agency.[32]

(6) Effect of Disagreement Between Trial Examiner and Agency

The existence of disagreement between the trial examiner and agency is significant in determining the substantiality of the evidence. This was the point actually decided in the *Universal Camera* case. Since that time, the Supreme Court has had occasion to reiterate the significance of this circumstance.[33]

The reported decisions reveal that many of the Courts of Appeals feel almost predisposed to set aside agency findings in cases where the agency has reversed the hearing officer on a question of fact. Some of the courts feel that in this situation they have the right to determine in which direction the evidence "preponderates". For example, in *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.* (7th Cir. 1951), 191 F. 2d 786, the Court declared that where the findings of a trial examiner are supported by "a preponderance of the evidence" the action of the Commission in rejecting them is arbitrary.

In *U.S. Steel Co.* v. *N.L.R.B.* (7th Cir. 1952), 196 F. 2d 459, the Court came close to indicating that the agency cannot overrule its trial examiner on a question of credibility of witnesses, declaring: "We may not disregard the superior advantages of the examiner . . . for determining credibility, and so for ascertaining truth". Similarly, in *Deepfreeze Appliance Division* v. *N.L.R.B.* (7th Cir. 1954), 211 F. 2d 458, the same Court of Appeals declared: "The examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony." This case suggests that where the agency does overrule the trial examiner on the question of credibility, the appellate court will then determine whether the preponderance of the evidence is with the Trial Examiner or the Board; at least, the Court noted, in setting aside the Board's findings, that "there is no preponderance of the evidence" to support the findings made by the Board in overruling its trial examiner.

Perhaps not all Courts of Appeals would go so far as the Seventh Circuit in this area. It does clearly appear, however, that a great deal of significance is attributed by all the Courts of Appeals to a disagreement between an agency and its trial examiner as to a finding of basic fact and, likewise, as to the factual inferences derived from the basic facts. The question is discussed at length by Judge Learned Hand in *N.L.R.B.* v. *James Thompson & Co., Inc.* (2d Cir. 1953), 208 F. 2d 743.[34]

19. *E.g., Ohio Associated Telephone Company* v. *N.L.R.B.* (6th Cir., 1951), 192 F. 2d 664; *N.L.R.B.* v. *Amalgamated Meat Cutters* (9th Cir., 1953), 202 F. 2d 671.
20. *Victor Products Corp.* v. *N.L.R.B.* (D.C. Cir., 1953), 208 F. 2d 834; *N.L.R.B.* v. *Russell Manufacturing Co.* (5th Cir., 1951), 191 F. 2d 358; *Southern Stevedoring Co.* v. *Voris* (5th Cir., 1951), 190 F. 2d 275.
21. *N.L.R.B.* v. *Ray Smith Transport Co.* (5th Cir., 1951), 193 F. 2d 142; *Tampa Times Co.* v. *N.L.R.B.* (5th Cir., 1952), 193 F. 2d 582.
22. *Cream Wipt Food Products Co.* v. *Federal Security Admr.* (3d Cir., 1951), 187 F. 2d 789.
23. *Rubin Bros. Footwear* v. *N.L.R.B.* (5th Cir., 1953), 203 F. 2d 486.
24. *N.L.R.B.* v. *Trinity Steel Co.* (5th Cir., 1954), 214 F. 2d 120.
25. *N.L.R.B.* v. *Fuchs Baking Co.* (5th Cir., 1953), 207 F. 2d 737.
26. *Jewell* v. *United States* (6th Cir., 1953), 208 F. 2d 770; *N.L.R.B.* v. *International Brotherhood of Teamsters* (8th Cir., 1952), 196 F. 2d 1; *N.L.R.B.* v. *Amalgamated Brotherhood of Meat Cutters* (9th Cir., 1953), 202 F. 2d 671.
27. *N.L.R.B.* v. *Milwaukee Electric Tool Corp.* (7th Cir., 1956), 237 F. 2d 75.
28. *Del E. Webb Construction Co.* v. *N.L.R.B.* (8th Cir., 1952), 196 F. 2d 841.
29. *Whiting Corp.* v. *N.L.R.B.* (7th Cir., 1952), 200 F. 2d 43.
30. *Victor Products Corp.* v. *N.L.R.B.* (D.C. Cir., 1953), 208 F. 2d 834.
31. *N.L.R.B.* v. *Cleveland Trust Co.* (6th Cir., 1954), 214 F. 2d 95.
32. *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.* (7th Cir., 1951), 191 F. 2d 786.
33. *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 75 S. Ct. 855 (1955).
34. Other cases which give weight, in reversing an agency determination, to disagreement between trial examiner and the agency include: *N.L.R.B.* v. *Supreme Bed & Furn. Mfg. Co.* (5th Cir., 1952), 196 F. 2d 997; *Ohio Assoc. Tel. Co.* v. *N.L.R.B.* (6th Cir., 1951), 192 F. 2d 664; *N.L.R.B.* v. *Turner Construction Co.* (6th Cir., 1955), 227 F. 2d 498; *Folds* v. *F.T.C.* (7th Cir., 1951), 187 F. 2d 658; *N.L.R.B.* v. *Continental Baking Co.* (8th Cir., 1955), 221 F. 2d 427; *Allentown Broadcasting Corp.* v. *F.C.C.* (D.C. Cir., 1954), 222 F. 2d 781.

(7) Effect of Dissent Within Agency

The fact that there is disagreement among the members of the agency as to the findings of fact is another circumstance which tends to raise grave doubts as to the substantiality of the evidence.

In *Deepfreeze Appliance Division* v. *N.L.R.B.* (7th Cir. 1954), 211 F. 2d 458, the Court considered a record where two members of a three-man panel reversed the trial examiner's findings of fact. The third member, dissenting, agreed with the trial examiner. This meant, the court suggested, that the administrative vote was in effect two and two—the Court indicating that the views of the trial examiner and dissenting member of the Commission were entitled to fully as much weight for purposes of judicial review as those of the two members who spoke for the agency.

In a number of other cases, the opinion indicates that the existence of a dissenting opinion within the agency was considered by the Court to be a factor that should be carefully considered in determining the substantiality of the evidence.[35]

(8) Effect of Uniformly Crediting Agency's Witnesses and Discrediting Respondent's Witnesses

As above noted, when *Pittsburgh S.S. Co.* v. *N.L.R.B.* first reached the Supreme Court, 337 U.S. 656, 69 S. Ct. 1283 (1949), the Court reversed a declaration by the Court of Appeals for the Sixth Circuit that an administrative finding must be set aside as biased when the hearing examiner believed all the witnesses for the agency and disbelieved all the witnesses for respondent.

Nevertheless, the attitude originally exhibited by the Court of Appeals for the Sixth Circuit in that case has been reflected by other Circuit Courts in later cases. It can perhaps be concluded that a tendency on the part of the agency to credit all witnesses called by the agency and to discredit opposing witnesses makes its findings suspect, and inclines the Court to accord favorable reception to an argument that the findings are not supported by substantial evidence.[36]

35. These cases include: *Westinghouse Electric Supply Company* v. *N.L.R.B.* (3d Cir., 1952), 196 F. 2d 1012; *Motion Picture Advertising Service Co.* v. *F.T.C.* (5th Cir., 1952), 194 F. 2d 633; *N.L.R.B.* v. *Coats & Clark, Inc.* (5th Cir., 1956), 231 F. 2d 567; *N.L.R.B.* v. *Turner Construction Co.* (6th Cir., 1955), 227 F. 2d 498; *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.* (7th Cir., 1954), 191 F. 2d 786.

36. Two typical cases, both decided by the Court of Appeals for the Eighth Circuit, are *Local No. 3* v. *N.L.R.B.*, 210 F. 2d 325 (1954), and *Farmers Co-operative Company* v. *N.L.R.B.*, 208 F. 2d 296 (1953).

The 1958 Ross Prize Essay

(Continued from page 956)

stopped or ejected.[38]

The delicate necessity of preserving both national security and individual liberty is too great to be left largely in the hands of administrators. This is a field in which the experts are the courts, trained in the traditions of the Constitution and in the common law which has served so well whenever fundamentals are involved. The functions of the Board of Immigration Appeals must be transferred to the courts generally or to a special Immigration Court.[39]

The allied rights of freedom of speech and expression are subject to several serious and largely unfettered administrative controls. Under a doubtful construction of the Foreign Agent's Registration Act of 1938,[40] as amended in 1942, the Customs Bureau and the Post Office Department destroy, without notice to sender or addressee, any printed matter from other countries which they decide constitutes "foreign propaganda", a term subject to almost any definition. Both the above agencies have broad additional powers to prevent the transmission of material deemed seditious or obscene, and the Postmaster General also has the power to revoke the second-class mail privileges of periodical publications, revocation being the practical equivalent of suppression. Here again we are in a vital field where the judiciary has the expertise and where the dangers of arbitrary action are so vital that only the courts should have the right to act.[41]

D. Our fourth category contains the powerful industry-wide independent regulatory agencies about which (together with the FTC and the NLRB) most controversy arises. The highlights of their historical development have been outlined earlier in this article, as have the reasons for the grants to them of the right to exercise judicial powers or adjudicatory techniques. To recapitulate, each of these agencies was formed to cure certain evils which had not been alleviated by the existing branches of government, and to exercise an affirmative, continuing guidance over the future activities of the industry concerned. The Supreme Court aptly expressed the differing functions of administrative and judicial adjudication in this field as follows:

> The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.... To a large degree they [administrative agencies] have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither through self-executing legislation nor by the judicial process.[42]

Effective regulation of a complex twentieth-century industry requires a cohesive, integrated instrumentality of control, having adequate staffs with as varied skills as the industry to be regulated, able to focus constant attention on that industry and to initiate action, and with the power to use all techniques, including the adjudicative, necessary to make its control meaningful and effective.

Apart from the complaint of violation of the separation of powers doctrine, already discussed, four main objections have been made to administrative control as represented by the

38. *Id.*, page 269.

39. The Hoover Commission Task Force recommends the latter plan on the basis of the tremendous volume of cases involved, which would overburden the regular courts. *Op. cit.* note 36, page 278.

40. 56 Stat. 250, 255 (1942).

41. The statements of fact in this paragraph, though not the conclusions, are largely taken from Gellhorn, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956), Chapter 2.

42. *Fed. Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142, 84 L. ed. 656, 661 (1939).

industry-wide agencies:[43]

(1) The presence of an inherent "leftist" orientation;

(2) A tendency toward totalitarianism, undermining "the rule of law";

(3) Bias; and

(4) Susceptibility to improper influence.

Certainly an antipathy toward a substantive program is not in itself a valid reason for criticizing the agency administering that program. However, in the early days of the independent regulatory agencies the administrative process was believed, with hope by some and with fear by others, to have an inherent political or social orientation. But "both the thrill and the chill failed to take into account basic factors limiting the managing and 'planning' potentialities of the administrative process".[44] Natural economic forces have in this country proved infinitely more potent than all the regulatory agencies combined in determining social and political orientation. Having observed the changes in aims and policies in the various agencies from time to time to meet the needs and demands of the people resulting from the development of new goods and services by industry, we must now realize that there is no such thing as a permanently built-in administrative viewpoint. The administrative process is instead a maneuverable device, shifting orientation as economic and social developments and varying legislative expressions may direct.

The complaint of totalitarianism is primarily directed at governmental regulation as such. Insofar as it constitutes an accusation that administrative use of adjudicatory techniques violates the principle of "rule of law", it is subject to the gibe that we are really advocating the rule of lawyers.[45] The rule of law certainly must be preserved, but if for the term we accept perhaps the best modern definition—"a state of affairs in which there are legal barriers to governmental arbitrariness and legal safeguards for the protection of the individual"[46]—we can through combined legislative and judicial control of administrative procedures[47] and through judicial review[48] achieve those ends without sacrificing the efficiency of the administrative process.

The accusations of bias seem largely unfair. The twentieth-century agency is created and from time to time revitalized to accomplish positive results —a bias in favor of the basic program is required by the legislative history and the terms of the governing statutes. Cardozo has reminded us that every person, every judge, necessarily views any given situation from a point where he is placed by his own heredity and environment[49]—no one of us can look at the world out of another's eyes. Yet bias must not impair fair-mindedness, especially in adjudication. Careful scholarship seems to have shown that administrative agencies have been subject to isolated lapses in this respect to no greater extent than have the courts.[50] And charges of bias have been far less frequently heard since the agencies "went conservative" in the late 1940's, lending weight to the belief that many criticisms leveled at administrative authorities are in actuality motivated by antagonism to the substantive programs entrusted to their care.

The very real problem of agency exposure and susceptibility to improper influence is at the time of writing highlighted by congressional investigation of the Federal Communications Commission. This problem is best solved by (a) the formulation and enforcement of a code of ethics for administrators,[51] (b) the enforcement of legislation imposing criminal penalties on persons exerting improper influence; and, most importantly, (c) the development among legislators, members of the executive branch of government, politicians and the people generally of the realization that it is as immoral and destructive to attempt to influence administrative decisions as judicial ones. All branches of the government must co-operate to this end, since it is a joint problem of all. As yet, the drastic step of complete removal of administrative adjudicatory powers does not seem justified—if it later does, we can have confidence in the abilities of the judiciary to fill the gap.

On balance, the reasons for continuation of exercise of judicial powers in the industry-regulatory agencies outweigh the objections.[52]

E. By far the greatest difficulty in determining whether judicial powers should be exercised by administrative

43. See Davis, ADMINISTRATIVE LAW, page 22 (1951). Other criticisms, such as the institutionalized decision, rejection of exclusionary rules of evidence, and the use of extra-record information raise important questions of procedure. These are proper subjects for concern, but are subject to control by the Administrative Procedure Act and by judicial review—they have no bearing on the question of the exercise by administrative agencies of judicial powers as such.

44. Jaffe, *The Effective Limits of the Administrative Process: A Re-evaluation*, 67 HARV. L. REV. 1105, 1107 (1954). Professor Jaffe, one of the most objective experts on administrative law, here discusses various reasons why the administrative process is limited in scope, including (1) the pressures on the agency by the industrial organization subject to it; (2) the dynamism of the industrial process, which forces development along certain lines determined by natural economic forces, regardless of the desires of administrators; (3) the natural let-down in aggressive regulatory action once the crisis giving rise to the establishment or revitalization of the agency has been resolved; and (4) the general lack of enthusiasm of the American people for any more regulation than is absolutely essential.

45. See speech by Sir Reginald Edward Manningham-Buller, Attorney General of England, before the 79th Annual Meeting of the American Bar Association, *The Rule of Law: Its Status in the Modern World*, 42 A.B.A.J. 1015, 1018.

46. W. Friedmann, LAW AND SOCIAL CHANGE (1951), page 282.

47. The virtues of combined action by the legal profession and the legislative branch in working out the necessary checks on administrative power generally, in order to preserve the rule of law, are interestingly developed by Professor Schwartz in an article advocating establishment of a permanent congressional committee on administrative practice and procedure. Bernard Schwartz, *Legislative Oversight: Control of Administrative Agencies*, 43 A.B.A.J. 19, 22 (1957).

48. The absolute necessity for preserving the rule of law imposes an obligation on the courts to resist a noticeable present tendency to allow unlimited discretion to administrative adjudication on the grounds of administrative "expertness" and congressional intent. "The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution." Louis L. Jaffe, *Judicial Review: Questions of Law*, 69 HARV. L. REV. 239, 275 (1955).

49. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921), pages 167-171.

50. The major controversy over this subject was started by Dean Pound's listing of unfortunate tendencies in the administrative process, including "a tendency to make decisions on the basis of preformed opinions and prejudices." Pound, For the *Minority Report*, 27 A.B.A.J. 664 (1941). Also see his *The Challenge of the Administrative Process*, 30 A.B.A.J. 121 (1944). That Pound's criticisms were not based on actualities was rather conclusively shown by Professor K. C. Davis in *Dean Pound and Administrative Law*, 42 COL. L. REV. 89 (1942) and "Dean Pound's Errors about Administrative Agencies," 42 COL. L. REV. 804 (1942).

51. The Administrative Law Section and the House of Delegates of the American Bar Association deserve credit for their prompt action in urging the establishment by Congress of a code of conduct for members of federal regulatory agencies setting standards comparable to the American Bar Association Canons of Judicial Ethics and prohibiting "influences and pressures from any source". See page 3 of the March 15, 1958, issue of the AMERICAN BAR NEWS.

52. It is noteworthy that the Hoover Commission Task Force, largely conservative in personnel, although advocating the principle of complete separation of powers, actually recommends the divestment from industry-regulating agencies of only such comparatively insignificant functions as the entry of orders for reparations and damages.

This writer does not feel that the snipping away of minor judicial powers is in principle desirable. *E.g.*, the power of the ICC to award reparations "is a necessary adjunct of the power to require the maintenance of reasonable and non-discriminatory rates." Arpaia, *The Independent Agency—a Necessary Instrument of Democratic Government*, 69 HARV. L. REV. 483 (1955).

agencies involves the Federal Trade Commission and the National Labor Relations Board. Most or all of the reasons advanced for the exercise of adjudicatory powers by industry-regulating agencies apply here, but there are far more powerful arguments against FTC and NLRB retention of such functions than apply to the others. The FTC and NLRB, while in a sense regulatory, differ from other independent agencies in the following important particulars.

First, they lack that most important essential of democratic government—precise accountability.[53] It is comparatively easy to tell whether the SEC or the CAB is doing a good job in the public interest in the limited fields in which they function. It is far more difficult to determine the same question when the FTC and NLRB are involved, since their actions are but one of many factors involved in the health of the general economy which they affect.[54]

Second, instead of a defined and limited area where technical non-legal expertness is essential, their inquiries involve a broad consideration of more intangible social and ethical factors—they deal with fields in which we may assert that courts are, or should be, the more expert.[55]

Third, these agencies are not regulatory in the sense that they lay down rules of general application, but instead are solely investigatory and prosecutory. Here the use, or threat of use, of adjudicatory powers is not in aid of other, more clearly legislative processes, but is the sole technique. While it is noted above that the use of the adjudicatory technique may actually be an exercise of a legislative power, it is nevertheless true that all organisms, in the words of the Supreme Court, "represent an interplay of form and function".[56] In the case of these two agencies, the forms are those of a court, the fundamental policies of their substantive programs have been established, and their adjudicatory functions should now be court-administered.

Finally, there is a widespread public distrust of the essential fairness of these agencies.[57] This is probably explainable in the case of the NLRB as "the inevitable outcome of a statute which gives employers no affirmative rights, imposes no duties upon employees and places upon the Board a duty of acting as prosecutor as well as judge".[58] This distrust has carried over in spite of the 1947 legislation imposing obligations on labor unions and providing complete internal separation of prosecuting and judging functions. The feeling with regard to the FTC, though less intense, arises from similar considerations. And, as Professor Davis has pointed out:

> So long as detached and informed opinions differ as to what is justice, one objective in a democratic society is to appear to do justice. That ideal remains unrealized so long as significant groups, whether or not misled, firmly believe that justice is denied.[59]

For the Bar to advocate the transfer to the courts of the adjudicatory functions of the NLRB and the FTC is a bold and self-challenging course. These are the two agencies which, so nearly identical in form to traditional courts, were established almost solely because of a belief that the judiciary's economic and social opinions were so far opposed to the prevailing ideals of the time that the courts would subvert the legislative purpose.[60] This belief was largely justified and was widely held.[61] If the judicial functions of these agencies are transferred to the courts, the Bar and judiciary must thereafter so act as to convince a still slightly suspicious people that their former causes for distrust are abated. In requesting such transfer we represent to the nation that the work of Holmes, Cardozo, Brandeis, Pound and many others has had its effect—that American common law, attuning itself more closely to the convictions of the present rather than the convictions of the past, recognizes the necessity in its work for consideration of contemporary social, industrial and political conditions as well as historical factors, and is therefore entitled to exercise its traditional functions under the conditions of modern society. This is a strong representation and a magnificently challenging one, worthy of the best traditions of the Bench and Bar.

IV.

In summary, then, administrative exercise of judicial powers should be permitted in three instances:

(1) In claims or "benefit" agencies, where the "adjudications" are not really controversial, do not need formal judicial techniques, and are of such volume as to be impossible of practicable administration by the courts.

(2) In industry-regulatory agencies, where continuing supervision of complex industrial organizations requires the constant attention of specialists in non-legal fields and where the use of adjudicatory techniques is in addition and supplementary to rule-making and other more usual forms of regulation.

(3) In agencies (such as the FTC

53. *Id.*, at page 506.

54. Dean Landis once made this distinction as follows:

"When today we think of the railroad problem, the banking problem, the stock exchange problem, we think of them in terms of the responsibility for their solution as it may rest with the Interstate Commerce Commission, the Federal Reserve Board, or the Securities and Exchange Commission. . . . But in the case of the Federal Trade Commission or the National Labor Relations Board it is otherwise, for neither fulfils a similar task nor bears a like responsibility. Rather they possess more nearly the character of tribunals, of business and labor courts, where the function is one more closely akin to policing as distinguished from promoting.

"The distinction is significant." Landis, THE ADMINISTRATIVE PROCESS, page 17 (1938).

In the light of the past twenty years it appears that Dean Landis greatly overestimated the abilities of the administrative process to solve by itself the problems of industry; however, the quotation is valid in the context of distinguishing the FTC and the NLRB from industry-regulatory agencies.

55. In one sense, particularly in dealing with problems cutting across many fields of human endeavor, "in which judges have more 'expertise' than commissioners, if the latter are expert in their special fields, the former are experts in synthesis. Daily confronted with the entire range of social conflict, the judges acquire perspective, become aware, as no commissioner can, of all the conflicting goals towards which a society struggles." Louis B. Schwartz, *Legal Restrictions of Competition in the Regulated Industries*, 67 HARV. L. REV. 436, 473-4 (1954). This assertion appears to have much more validity in the present context than in support of Professor Schwartz' plea that the courts should shape the outlines of policy now developed by industry-regulatory commissions.

56. Mr. Justice Frankfurter speaking for the court in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142, 84 L. ed. 656, 661 (1940).

57. See Davis, ADMINISTRATIVE LAW (1951), pages 404-406.

58. Hearings before the Committee on Labor and Public Welfare on S. 55 and S.J.Res. 22, 80th Cong., 1st Sess. 2045 (1947).

59. Davis, ADMINISTRATIVE LAW (1951), page 405.

60. The Federal Trade Commission was established in 1914 because, in the words of a Senate Committee so recommending: "The people of this country will not permit the courts to declare a policy for them with respect to this subject." Report of Senate Committee on Interstate Commerce, Sen. Rep. 1326, 66th Congress, 3d Session (1914).

A further quotation from Dean Landis is pertinent:

"In the field of unfair competition and monopoly, and in the field of labor, there was widespread distrust of the courts' ability to evolve workable concepts to direct the economic force which had posed these problems. . . . Here distrust based itself upon the belief that the men who composed our judiciary too often held economic and social opinions opposed to the ideals of their time. The distrust was not without foundation." Landis, THE ADMINISTRATIVE PROCESS, pages 32-34 (1938).

61. See Davis, *op. cit.* note 59, page 15, as an example of statements to this effect found almost universally in works on the history of the American administrative process.

and NLRB) administering new and untried economic and social policies cutting across many segments of the nation's life, and which therefore of necessity must use a cautious case-by-case adjudicatory method in determining the proper implementation of such policies. *In these instances, administrative adjudication should be permitted only for such period of time as is necessary to develop a generally accepted body of precedent.* As soon as this has been done their adjudicatory powers should be transferred to the courts.[62]

Administrative exercise of judicial powers should be denied, or if in existence should be removed, in all other cases, particularly where fundamentals of life, liberty and freedom of expression are involved. Even where administrative adjudication is permissible, judicial review should be preserved and strengthened, and the Bar should continue its efforts to assure that administrative procedures are conducted in accordance with the highest standards of fairness.[63]

In immediate application these recommendations involve transfer to the present court system, or preferably to specialized courts, of the judicial functions of the Immigration and Naturalization Service, the National Labor Relations Board, the Federal Trade Commission and certain authorities within the Post Office Department and the Customs Bureau. These changes should be specifically advocated—we only hurt our cause by continuing to demand the elimination of *all* administrative adjudication on the basis of an irretrievably discredited over-rigid application of the separation of powers doctrine.

62. A compelling reason for wide exercise of administrative judicial powers in the early years of agencies administering new and untried policies is the necessity for the maintenance of the judiciary's reputation for fairness. Since new social and economic programs are almost always bitterly opposed in the beginning by large segments of the nation, judicial administration in these early stages would tend to destroy the confidence of many classes of people in the courts. It is difficult to see how a judicial court with any regard for expressed legislative intent could have adjudicated matters arising under the National Labor Relations Act in the first few years following its enactment without being deluged by cries of bias from much of the nation equally as bitter as those once directed at the N.L.R.B. See Section 1, National Labor Relations Act of July 5, 1935, 49 Stat. 449, excoriating the actions of employers in refusing to accept collective bargaining, and declaring a firm intent to permit the free formation of labor unions and to require their recognition as collective bargaining agents.

The Hoover Commission Task Force Report reaches the same result, though on different reasoning:

"When agencies are established to explore a new area of regulation, it is expedient to combine in them all the powers which are needed to achieve maximum effectiveness, even at the cost of consolidating judicial and legislative functions. . . . It is only after a period of experience that separation can readily be accomplished." Task Force Report, pages 241-2.

63. The Hoover Commission Task Force recommendations for strengthening the Administrative Procedure Act and for expanding judicial review are excellently conceived and deserve the wholehearted support of the entire Bar, proponents and critics of the administrative alike.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1959 Annual Meeting and ending at the adjournment of the 1962 Annual Meeting:

Alabama	New Mexico
Alaska	North Carolina
California	North Dakota
Florida	Pennsylvania
Hawaii	Tennessee
Kansas	Vermont
Kentucky	Virginia
Massachusetts	Wisconsin
Missouri	

Nominating petitions for all State Delegates to be elected in 1959 must be filed with the Board of Elections not later than March 27, 1959. Petitions received too late for publication in the April issue of the JOURNAL (deadline for receipt March 2) cannot be published prior to distribution of ballots, which will take place on or about April 10, 1959.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 27, 1959.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS

Walter V. Schaefer, *Chairman*

Harold L. Reeve

Robert B. Troutman

Constitutional Law

(Continued from page 944)

Senate as the price of their creation.[7]

Thus was emphasized the fact that the separation of powers applies to all agencies of the Government, whether created by the Constitution or by Congress. To hold otherwise would be to destroy the entire basic principle of separation itself.

In 1909, the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against United States Steel Corporation, and, if not, the reasons for non-action. President Theodore Roosevelt replied, refusing to honor this request upon the grounds that "Heads of the Executive Departments are subject to the Constitution, and to the laws passed by Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever."[8]

This refusal reiterated the principle that the Executive Branch will maintain the inviolability of documents in official files containing information from private sources which has been communicated to it in confidence.

Incidents in more recent times are relatively well known and need not be detailed here. However, let me turn your attention for illustrative purposes to two such incidents in the Truman Administration. One incident involved the request of a congressional committee for the loyalty-security file with respect to Dr. Condon, then the Director of the National Bureau of Standards of the Department of Commerce. On March 3, 1948, the Committee adopted the extraordinary course of issuing a subpoena to Secretary of Commerce Harriman to produce the file, which, by order of President Truman, Mr. Harriman refused to do.[9]

On March 13, President Truman issued a directive to all officers and employees in the Executive Branch, forbidding the disclosure of loyalty files and directing that any demand or subpoena for such files from sources outside the Executive Branch should be declined and the demand or subpoena referred to the Office of the President.[10] On April 22, the House of Representatives adopted a resolution peremptorily ordering Secretary Harriman to surrender the desired data respecting Dr. Condon.[11] Citing the President's directive, the Acting Secretary wrote the Clerk of the House that he respectfully declined to transmit the requested document and that in accordance with the directive, he was referring the matter to the President.[12] President Truman had earlier stated that he would not accede to the House Resolution.[13]

In connection with the Condon incident there was introduced on March 5, 1948, a resolution which would have directed all executive departments and agencies to make available to any and all congressional committees information which may be deemed necessary to enable them to properly perform the duties delegated to them by Congress.[14] With respect to this bill, the *St. Louis Post-Dispatch* on May 10, 1948, made the following observations:

> Even without the penalties for disclosure, Congress should not assert absolute rights to presidential information. It should have full access to records needed for forming policy, but the executive branch also possesses administrative records in which Congress has no valid interest. The presidency is an equal branch of government, with constitutional rights and mandates separate from those of Congress. Its right to withhold certain kinds of information from Congress, and the public interest in having such information withheld, has been successfully defended since the time of President Jefferson.
>
> No Congressman would think of demanding conference transcripts, personnel records or any other private papers from the Supreme Court, the third equal branch of government. The President cannot demand the records of private congressional committee sessions. The Supreme Court makes no such demand on either Congress or the President. No more should Congress try to destroy the President's right to a reasonable and necessary privacy in his department.
>
> The founding fathers expected Congress and Presidents to minimize their rivalries by the exercise of reasonable confidence and give-and-take. It needs that spirit to make the American system of government succeed. . . .

The resolution passed the House on May 13, 1948, and was referred to the Senate, where it died in committee.

So we see that from the beginning of our Government the position of the President and the Executive Branch has been that while no one could question the constitutional right of Congress to inform itself on subjects falling within its legislative competence, yet, as Professor Corwin puts it:

> This prerogative of Congress has always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself.[15]

The constitutional authority of the Chief Executive over the Executive Branch is illuminated by the ultimate fate of a proposed amendment to the Atomic Energy Act of 1946. It provided that where the appointment of members or personnel of the Atomic Energy Commission is subject to Senate confirmation the Senate members of the Joint Committee on Atomic Energy may direct the FBI to investigate the character, associations and loyalty of any such appointee, and that the Director of the FBI should file a written report of any such investigation and thereafter should furnish such amplification or supplementation as the Senate Committee may direct.[16]

Senator Morse opposed the bill as "clearly unconstitutional" as an infringement on the appointive power of the President. A proponent of the bill argued that it did not attack the appointive power and that it dealt only—

> . . . with the right of Congress to have the Federal Bureau of Investigation, which is a creature of Congress, perform a function for Congress; and it provides that Congress may use the

7. 8 Richardson, *op. cit. supra* note 5, at 377.
8. 43 Cong. Rec. 527-528.
9. Corwin, The President: Office and Powers 142 (1948 ed.). Professor Corwin is also the editor of the most recent edition of The Constitution, Annotated, S. Doc. No. 170, 82d Cong., 2d Sess. (1952).
10. 3 CFR 1081 (1943-1948 Comp.). For the explanatory memorandum which was issued by the Office of the President on March 15, 1948, see H. R. Rep. No. 1595, 80th Cong., 2d Sess. 8-10 (1948).
11. H. Res. 522, 80th Cong., 2d Sess., 94 Cong. Rec. 4777 (1948).
12. New York Times, April 25, 1948, page 50, col. 3.
13. New York Times, April 23, 1948, page 1, col. 1.
14. H. J. Res. 342, 80th Cong., 2d Sess.
15. Corwin, The President: Office and Powers 116 (1957 ed.).
16. S. 1004, 80th Cong., 2d Sess.

FBI report as a basis of consideration as to whether or not the nomination of a particular person should be confirmed by the United States Senate.[17]

The late Senator McMahon, of Connecticut, who had served earlier as Assistant Attorney General in charge of the Criminal Division, answered this contention. He declared that the best statement in the cases on the point at issue was to be found in *Kilbourn* v. *Thompson*, to which I shall refer later. There then ensued the crux of the argument as to the power of Congress to provide by statute for its utilization of the services, facilities, investigative files and reports of a unit of the Executive Branch. Because of the wide power conferred upon the Atomic Energy Commission it was urged that:

> We should not have an iron curtain lowered so that we may not have all the facts which we need in discharging our responsibilities.[18]

Senator McMahon answered:

> I do not believe that the Congress can say to the President of the United States, "we are bypassing you. We are not going to talk to you. We are not going to talk to the Attorney General, who is one of your Cabinet officers and who is responsible to you. We are going to reach over both of you and tell a bureau chief that he shall do this, that, and the other thing, and report to us." It is my contention that the Constitution will not permit the Congress legally to do such a thing.

With reference to a contention that the Senate and House are policy-making bodies with a right to obtain the facts in order that they may legislate properly, and in the case of the Senate to advise and consent to nominations, Senator McMahon replied that this contention was "directly in the face of the law". He added:

> I say to the Senator that much as he might desire to obtain an investigatory report on the work of the FBI, if the Attorney General refused to give it, it is my prediction that the Senator would find that the Supreme Court would uphold the right of the Attorney General to decline to produce the report. The cases are too clear to admit of any question. The Senator may not like the proposition. He may not like it because he is in the Senate. If he were connected with the executive department he might take another view. But that happens to be the law. What I contend is, when we know it is the law, we ought not to pass a bill which flies directly in the face of the constitutional provision.[19]
>
> * * *
>
> To assert, as the Senator . . . did, that it would be possible to call upon the director of the subsidiary bureau to produce a report in the face of the constitutional argument that is made in *Marbury* v. *Madison*, in the later *Kilbourn* case, in the recent *Meyers* case, the *Humphrey's* case, and also a Federal Trade Commission case, the title of which escapes me at the moment, is to deny plain English in the reports of those cases.[20]
>
> If perchance there should be a change in the Executive at 1600 Pennsylvania Avenue at any time while I sit as a Member of this body, the position I take today will be exactly the position I shall take then upon any attempt to destroy what I regard as a very essential provision of the Constitution. Let me say to Senators who are present that there is no provision of the Constitution the religious observance of which is better calculated to insure justice and liberty to the people of the United States than the provision that judges shall judge, legislators shall legislate, and executives shall execute.[21]

The bill was passed by the Congress, but was vetoed by the President.[22] In the Senate debate as to whether the veto should be overridden or sustained, Senator McMahon observed that the Senate appeared to be proceeding on the theory—

> . . . that the legislative branch of the Government is supreme over the executive branch of the Government. The executive and legislative branches of the Government are coequal and coordinate. Of course this contest we are talking about now has been going on for 150 years. It has been tested time and time again. If the executive were to give up any of the power he legally has under the Constitution, he would be betraying the people of the United States whom he also serves in his constitutional capacity.[23]

A Senator who was in favor of overriding the veto argued that it was wrong to say—

> . . . that whenever Congress creates an executive agency it cannot modify, change, or direct its actions when it is acting for the Congress or the people.

Senator Barkley answered:

> . . . We are authorizing a committee to command that executive appointees shall be the servants of a committee, and if we can do that with respect to the Atomic Energy Commission, we

17. 94 Cong. Rec. 4303.
18. *Id.*
19. *Id.* 4305.
20. *Id.* 4307.
21. *Id.* 4311.
22. S. Doc. No. 157, 80th Cong., 2d Sess. (1948).
23. 94 Cong. Rec. 6199.

can do it with respect to postmasters, district attorneys, United States judges, and even members of the Cabinet, because they are creatures of the Congress.[24]

Senator McMahon concluded the debate against the motion to override by saying

> . . . that man cannot have two masters. He cannot serve both the President of the United States and the Senate members of the Joint Committee on Atomic Energy.[25]

In the end the Senate failed to override the veto.[26]

Congressional efforts to obtain loyalty-security files respecting various individuals continued into President Eisenhower's Administration. An editorial in the *Washington Post and Times-Herald* for March 10, 1953, made the following observations:

> So far as executive files are concerned, President Eisenhower would do well, we believe, to follow the example of almost every earlier occupant of the White House. "Full cooperation" [a phrase used by the State Department officer in charge of such investigations] means, among other things, that no congressional committee should claim what it has no right to receive.

A year later at the height of the McCarthy-Army controversy the President issued his letter of May 17, 1954, to the Secretary of Defense stating:

> It has long been recognized that to assist the Congress in achieving its legislative purposes every Executive Department or Agency must, upon the request of a Congressional Committee, expeditiously furnish information relating to any matter within the jurisdiction of the Committee, with certain historical exceptions—some of which are pointed out in the attached memorandum from the Attorney General. This Administration has been and will continue to be diligent in following this principle. However, it is essential to the successful working of our system that the persons entrusted with power in any one of the three great branches of Government shall not encroach upon the authority confided to the others. The ultimate responsibility for the conduct of the Executive Branch rests with the President.
>
> Within this Constitutional framework each branch should cooperate fully with each other for the common good. However, throughout our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation.
>
> Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.
>
> I direct this action so as to maintain the proper separation of powers between the Executive and Legislative Branches of the Government in accordance with my responsibilities and duties under the Constitution. This separation is vital to preclude the exercise of arbitrary power by any branch of the Government.[27]

This letter met with favorable public response. Let me quote from editorials which appeared in papers which have been very sensitive to any improper withholding of information. The next day, an editorial in The *New York Times* made this comment on the President's letter:

> The committee seems to feel that it has the right to pry farther into the conversations and discussions among members of the executive branch while they were considering a serious problem and, perhaps, reaching important decisions. The committee has no more right to know the details of what went on in these inner Administration councils than the Administration would have the right to know what went on in an executive session of a Committee of Congress.

An editorial in the *Washington Post and Times-Herald* for May 20, 1954, made the following observations:

> The question is simply whether the executive departments are to be administered by the properly constituted executive officials, or whether there is

24. *Id.*
25. *Id.* 6263.
26. *Id.* 6264.
27. The letter and the memorandum are reproduced in 100 Cong. Rec. 6263 (daily ed. May 17, 1954).

to be a sort of government-by-McCarthy. President Eisenhower was abundantly right in protecting the confidential nature of executive conversations in this instance.

III. Separation of Powers

Much has been written respecting the doctrine of separation of powers under the Constitution. In such a statement as this it is obviously impracticable to discuss its full application. I shall, however, make these comments.

The Supreme Court's classic statement of this doctrine arose in connection with a congressional investigation. In the 1870's the firm of Jay Cooke & Sons went into bankruptcy, and the appropriate judicial proceedings were instituted. As Navy funds were deposited with the firm, the United States was a creditor. Upon that basis a House Committee instituted an investigation of a real estate pool in which the Cooke firm had participated.

The Committee issued a subpoena *duces tecum* to one Kilbourn. When he refused to produce certain documents, the House held him to be in contempt, and ordered him confined to the District of Columbia jail until he purged himself of his purported contempt. Thereafter Kilbourn instituted an action for false imprisonment: In reviewing the congressional proceedings the Supreme Court said:

> It is believed to be one of the chief points of the American system of written constitutional law, that all powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined.
>
> * * *
>
> In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of the departments cannot be exercised by another.
>
> It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century [in 1880] has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made . . . [*Kilbourn* v. *Thompson*, 103 U.S. 190-191. (1880).]

The Court held that the subject matter of this congressional investigation was judicial, and not legislative, that it was then pending before the proper court, and that the House lacked power to compel Kilbourn to testify on the subject.

The proposition in the *Kilbourn* case is that one of the three grand departments should not encroach upon the other. Thus what is true of the relationship between the Legislative Branch and the Judicial Branch is likewise applicable to attempted encroachment by the Legislative Branch with respect to the Executive Branch.

At an earlier day in our national history the Supreme Court summarized the responsibility of the President for the administration of the Executive Branch in the celebrated case of *Marbury* v. *Madison*. There Chief Justice Marshall said:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists and can exist no power to control that discretion. [1 Cranch (5 U.S.) 137, 164 (1803).]

This extract from Chief Justice Marshall's opinion in *Marbury* v. *Madison* certainly indicates a measure of the extent to which the President's discretion may be exercised by his subordinates, subject, of course, to conformity with his orders.

I recognize, of course, that Congress has broad powers of inquiry and investigation as an "attribute of the power to legislate".[28] I have had some years of personal experience as counsel to legislative investigations. I recognized then and do now that the power to legislate is itself subject to constitutional limitations. So too, is the power to investigate. It is limited by the Fourth Amendment prohibition against unreasonable searches and seizures[29]

28. *McGrain* v. *Daugherty*, 273 U. S. 135, 175 (1927).

29. In *Hearst* v. *Black*, 87 F. 2d 68 (D. C. Cir. 1936) a legislative subpoena was held to be too broad contrary to the Fourth Amendment. Cf. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 299, 307 (1924). "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law." But see *In re Chapman*, 166 U.S. 661, 668 (1897).

and the privilege against self-incrimination protected by the Fifth Amendment.[30] Although the exact scope of the limitations is unclear the protections of the freedoms of religion, speech, and the press contained in the First Amendment also operate to limit congressional investigative power.[31]

The limitations on the investigative power are not confined to those expressly set forth in the Constitution. The classic expression of this principle is contained in *Kilbourn* v. *Thompson*, previously mentioned:[32]

> It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. . . .

This is not mere doctrine. It was regarded by the Founders as necessary to prevent the tyranny and dictatorships that result from the undue concentration of governmental powers in the same hands. Mr. Justice Brandeis has observed:

> The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments to save the people from autocracy.[33]

Nor is there any question that protection against legislative autocracy was one of the principal aims of the Founders. From their knowledge of English history, the early settlers knew of the tyranny of the Long Parliament and others that followed it. What was particularly vivid in their minds were the harsh measures which colonial legislatures adopted for the early settlers. Those who dared criticize legislative proceedings or to reflect upon their integrity were punished directly and without the intervention of courts or the authority of statutes, and the punishments were frequently severe and degrading.[34] The Supreme Court has said:

> When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned.[35]

It was probably based upon experiences such as these that Jefferson concluded: "One hundred and seventy-three despots would surely be as oppressive as one."[36] So too, Alexander Hamilton out of his experience declared: "The tendency of the legislative authority to absorb every other has been fully displayed and illustrated."[37] Therefore, it is not surprising that when the Federal Convention met in 1787 to adopt a new Constitution, its members were determined to enhance the powers of the executive and to restrict the powers of the legislative branch.[38]

The doctrine of the separation of powers was thus the very foundation stone of the Federal Government as established by the Constitution. It was regarded as the basic guarantee of the liberties of the people against tyranny. In view of this background, it is not remarkable that it has retained vitality and been given practical application throughout our history. Each branch has acted upon it and been protected by it. It has been held that the legislative branch in the exercise of its investigatory powers may not exercise basically judicial functions. *Kilbourn* v. *Thompson, supra; United States* v. *Icardi*, 140 F. Supp. 383 (D.C.D.C. 1956). Similarly the courts may not properly intrude on the exercise of legislative functions. *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (D.C.D.C. 1956), or on the Executive, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Co.*, 333 U.S. 103 (1948). And the President may not exercise legislative functions. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

A wise exercise of restraint has operated to prevent a test of all the possible situations in which one branch might invade the functions of another. However, there is little doubt that the investigative power of Congress could not constitutionally support an investigation into the discussions of the members of a federal court relating to the decision in a specific case because this would be utterly destructive of a free judiciary. This certainly was the view of the House of Representatives in the converse situation, involving attempts to require the disclosure of certain information to courts. It resolved that:

> No evidence of a documentary char-

30. *McGrain* v. *Daugherty*, *supra* note 28, at 173-174; *Kilbourn* v. *Thompson*, *supra*; *Quinn* v. *United States*, 349 U.S. 155 (1955).
31. See *Rumely* v. *United States* (App. D. C.) 197 F. 2d 166, 173; aff'd. *United States* v. *Rumely*, 347 U.S. 41 (1953). The Supreme Court declined to decide the issue on constitutional grounds. It held that the questions asked were outside the scope of the House Resolution authorizing an inquiry into lobbying; that only direct pressures were intended to be investigated, and not attempts to influence public opinion by books and other writings.
32. 103 U.S. 191.
33. *Myers* v. *United States*, 272 U.S. 52, 293 (dissent) (1926).
34. Potts, *Power of Legislative Bodies To Punish for Contempt*, 74 U. Pa. L. Rev. 691, 697-712 (1926).
35. *United States* v. *Lovett*, 328 U.S. 303, 318 (1946).
36. Jefferson, Notes on the State of Virginia, 120 (1954 ed.).
37. The Federalist, No. 71.
38. Warren, *Presidential Declarations of Independence*, 10 Boston U. L. Rev. 1, 2 (1930).

acter under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission.[39]

The same considerations may be said to operate with respect to an investigation of confidential advice within the Executive Branch. It has long been believed that the President may in his own discretion withhold documents from a court. In the trial of Aaron Burr, Chief Justice Marshall said:

> In no case of this kind would a court be required to proceed against the president as against an ordinary individual. . . . In this case . . . the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge, It is their operation on his mind, not on the mind of others which must be respected by the court.[40]

Under the doctrine of *Marbury* v. *Madison, supra,* this power may be exercised on his behalf and with his approbation by those whose acts "are his acts". This finds support in the judicial recognition, without reference to statute, of the fact that the privilege against revealing military secrets "is a privilege which is well established in the law of evidence". *United States* v. *Reynolds,* 345 U.S. 1, 7, and cases there cited. The *Reynolds* case also indicates that the privilege "which protects . . . state secrets" stands on a parallel footing with the military secrets privilege. *Id.*

To conclude that a constitutional privilege exists in the President and in those acting on his behalf and pursuant to his direction to withhold documents and information as against a congressional demand for production or testimony does not wholly dispose of the problem. A further question arises. Is the Executive or the Congress to determine whether the privilege is appropriately asserted in a given case? There is no judicial precedent governing this question.

As a practical matter, only the President can make the determination as to disclosure. A House Judiciary Committee took this view in deciding who is the best judge in a close case, of the propriety of divulging to any committee of the House "state secrets". It first noted that "in contemplation of law, under our theory of government, all the records of the executive departments are under the control of the President of the United States". Then it recognized what is so plainly implicit in the doctrine of separation of powers:

> The Executive is as independent of either House of Congress as either House of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

Finally, it came to the question as to whose decision must be accepted in this matter. Its Report stated:

> Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people. . . .[41]

One of our great legal scholars, William Howard Taft, following his term as President and prior to his appointment as Chief Justice, summarized the situation succinctly and accurately when he said:

> The President is required by the Constitution from time to time to give to Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem this disclosure of such information prudent or in the public interest.[42]

We are dealing in this field with one of the most difficult, delicate and significant problems arising under our system. The doctrine of separation of powers and the system of checks and balances was designedly established in the Constitution as the basic guarantor of the rights of the people. Tyranny by dictators or royalty, by legislatures and by courts were all known to the founders. What they attempted to establish was a government in which no one of the three elements could become pre-eminent, subordinate the others and ultimately be in a position to dictate to, rather than serve, the citizenry.

The dangers which follow from the failure of one branch of the Government to respect the powers of any of the others is as great today as when

39. H. Res. 427, 81st Cong., 2d Sess. See 96 Cong Rec. 565-66.
40. Burr Trials 536 (1808).
41. H. R. Rep. No. 141, 45th Cong., 3d Sess. 3-4 (1879).
42. Taft. Our Chief Magistrate and His Powers, 129.

Washington, in his Farewell Address, felt impelled to caution that:

> It is important, likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department, to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. . . .
>
> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation, for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.[43]

The principle of separation of powers indicates the relationship of the independent regulatory agencies to this question of the extent of the inquiry which can be made by Congress of another branch. I refer to such regulatory agencies, sometimes styled independent commissions, as the Federal Communications Commission, Interstate Commerce, Federal Trade, Federal Power, and Securities and Exchange Commissions. They have been frequently described as exercising quasi-judicial, quasi-executive and quasi-legislative functions.

No categorical statement as to the extent of the inquiry which can be made by Congress will be applicable equally to each of the independent agencies. Statutes created these agencies at different times in our history and contain varying mixtures of judicial, executive and legislative functions. Some statutes create agencies which are predominantly legislative in character, others subject the agency to a strong proportion of executive control, in others the judicial function predominates. It is clear then that no answer to the question of the extent of permissible congressional inquiry of the independent agencies, or of permissible executive direction of independent agencies, can be given without considering the specific agency concerned, the statute creating it, the fact situation involved, and the particular function which the agency is exercising.

Not only by the original statutes creating the agencies, but by other legislation Congress has itself subjected the independent regulatory agencies to executive control. For example, the President has been authorized to apply the Federal Employees Security program to all departments and agencies of the Government.[44] This includes the regulatory commissions. Hence the regulatory commissions are also subject to the requirements of secrecy governing employee security matters. The President's power to remove commission members for inefficiency, neglect of duty, or malfeasance (as specified in the Federal Trade, Interstate Commerce, and Atomic Energy Commissions and the Civil Aeronautics Board) imply that he may exercise a certain amount of managerial authority over the Commissions.

Thus in many respects the functions and operations of the so-called independent regulatory agencies are subject to executive control. Referring to my discussion of the fundamental principle of separation of powers above, the extent of the inquiry which can be made by Congress of one of the independent agencies should be determined on this principle. To the extent that the agency exercises executive functions it would have the right and duty to furnish or withhold information from congressional inquiry to the same extent as would other executive departments and officers of the Federal Government.

On July 12, 1955, Attorney General Brownell had occasion to advise the Chairman of the Securities and Exchange Commission as to limits of congressional inquiry into executive functions of the SEC. Attorney General Brownell stated:

> With regard to your statement that the Commission is bound to respect the privileged and confidential nature of communications within the Executive Branch of the Government on the principles as set forth in the President's letter of May 17, 1954, to the Secretary of Defense, I concur. Any communication within the Securities and Exchange Commission among Commissioners or the Commissioners and the employees is privileged and need not be disclosed outside of the agency. Likewise any communication from others in the Executive Branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954.[45]

Attorney General Brownell's letter thus advised that the executive privilege applied to the independent agencies as to "communications within the Executive Branch" and "with respect to administrative matters". The executive privilege of course does not apply where the independent agencies are exercising *judicial* functions.

However, by analogous reasoning the doctrine of separation of powers provides a guide to the limits of congressional inquiry, not only in relation to executive functions of the independent agencies, but also to judicial functions. Let me make this clear. In my view, whatever the practice has been in the treatment of these independent regulatory agencies, whenever an agency is exercising its judicial function by deciding an adversary proceeding before it, it should be just as free of any demand from Congress or the Executive Branch as a court would be.

43. 1 Richardson, *op. cit. supra* note 5, at 219.
44. 64 Stat. 477, 5 U.S.C. §22-3. See Executive Order No. 10450, 3 CFR 72 (Supp. 1953); *Cole v. Young*, 351 U.S. 536 (1956).
45. Reproduced in Hearings on Power Policy, Dixon Yates Contract, Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 378-379 (1955).

Nor does the executive privilege apply to the independent agencies where they are exercising *legislative* functions. Congressional inquiry is thus not so limited as in regard to executive or judicial functions. But I would caution that other considerations might cause Congress itself to limit its inquiries on even legislative functions. Information of importance to competitors gathered in confidence from private businesses, for example, should not be publicized.

It should not be forgotten that the more frequent and the more extensive the congressional inquiries made of the independent agencies, the less free and truly independent those regulatory agencies will become.

In summary:

(1) the executive privilege applies to the executive functions of the independent agencies;

(2) the executive privilege obviously does not apply to judicial functions; similarly,

(3) legislative inquiry into the legislative functions of the independent agencies is not limited by any executive privilege, but there are other restraining considerations, some of which I have noted above.

IV. Proposed Legislation

Finally, I come to two bills which have been referred to the Committee. The first is S. 921, 85th Cong., which would amend §161 of the Revised Statutes. That Section is a codification for the ten executive departments of today of that provision of the 1789 Act respecting the Department of Foreign Affairs. You will recall that I discussed that act in the second part of my statement.

Section 161 now provides:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the record, papers, and property appertaining to it.[46]

S. 921 would amend §161 by adding a last sentence:

> This action does not authorize withholding information from the public or limiting the availability of records to the public.

As Deputy Attorney General, I expressed my views on this bill in a letter dated June 13, 1957, to Senator Eastland, Chairman of the Senate Committee on the Judiciary. Let me summarize those views.

Insofar as the purpose of S. 921 is to assure the full and free flow of information to the public where not inconsistent with the national interest, the Department of Justice is in full accord. We believe that within limits the Executive and Legislative Branches should keep the public informed of their activities, and should make available information, papers, and records. Without doubt both branches are in accord with this fundamental principle.

We do believe that S. 921 would not clarify §161 of the Revised Statutes. In the absence of legislative history or more specific language we cannot determine with any degree of certainty the effect of S. 921.

A recent example of the current application of this principle to the Legislative Branch is illustrated by an article in the *Washington Evening Star* on September 12, 1956. The article reads in part as follows:

> Congress barred the public from 1,131 of its 3,121 committee meetings in 1956, or more than one third of them.
>
> Spokesmen for several of those committees listed such things as national security, government efficiency and preserving the private rights of witnesses as reasons for closing meetings.

Such a statement is of course equally applicable to the proper functioning of the Executive Branch. Obviously it is equally applicable to the functioning of the Judicial Branch. Each of the three separate, co-equal and co-ordinate branches have recognized its force and significance in their relations with each other.

We in the Department of Justice cannot determine whether S. 921 would purport to override the principle that the disclosure of certain information would be inconsistent with the national interest. If Congress believes that any amendment to §161 of the Revised Statutes is advisable, it is equally advisable that any such amendment make it much clearer than S. 921 now would that Congress does not ignore that principle. As S. 921 now stands, it is impossible to determine with any certainty that it would give just recognition to that principle.

The second bill is S. 2148, 85th Cong., a bill to amend Section 3 of the Administrative Procedure Act of 1946.[47]

When Congress passed the Administrative Procedure Act it clearly recognized beyond question or doubt that there are functions of the Government where disclosure would be inconsistent with the national interest, and that the Government cannot otherwise function effectively.[48] These considerations, which Congress recognized then, I have discussed above, and because of these considerations I am opposed to the passage of S. 2148.

Certainly in the time available it is not possible for me to discuss in detail the amendments to Section 3 of the Administrative Procedure Act which S. 2148 would make and my reasons for opposing them. Those will be discussed in the necessary detail in the Department's report on the bill.

46. 5 U.S.C. §22.
47. 60 Stat. 238, 5 U.S.C. §1002.
48. See for example, S. Rep. No. 752, 79th Cong., 1st Sess. (1945).

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PITTSBURGH, PENNSYLVANIA	March 11-13, 1959
MEMPHIS, TENNESSEE	November 1-4, 1959

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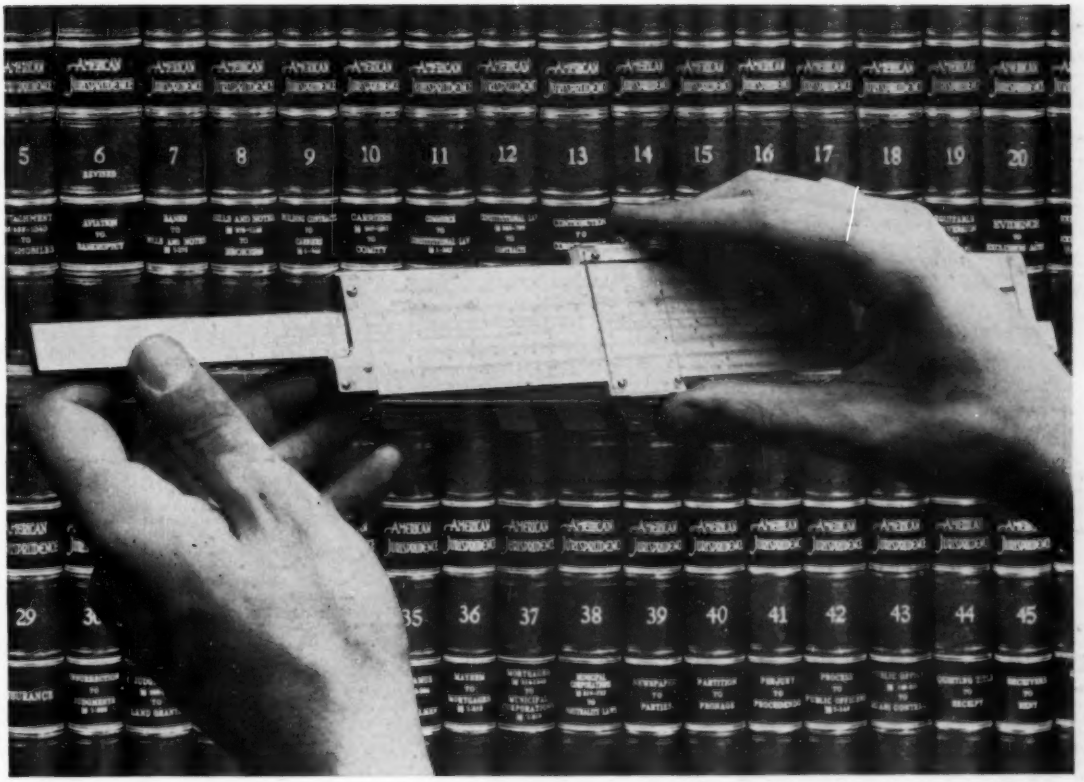

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